#### **APPENDIX**

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and New York STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

JEAN-MARIE MAUCLET,

Appellee.

EWALD B. NYQUIST, Commissioner of Education of the State of New York, The University of the State of New York, The Board of Regents of the State of New York, The New York Higher Education Assistance Corporation, Willard C. Allis, Dr. Ernest Boyer, Dr. Judah Cahn, Wilmot R. Craig, Thomas P. Denn, Walter A. Kassenbrock, Norma Kershaw, Rev. Laurence J. McGinley, S. J., William G. Morton and Russel N. Service, being the members of the board of directors of said corporation, and The New York State Higher Education Services Corporation,

Appellants,

against

ALAN RABINOVITCH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

Jurisdictional Statement Filed August 11, 1976 Probable Jurisdiction Noted November 1, 1976

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<sup>†</sup> Additional defendants are not indicated hereafter.

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# Relevant Docket Entries in Mauclet v. Nyquist, et ano.†

Date

Proceedings

1975

- Feb. 13 Filed complaint.
  - 13 Issued summons and one (1) copy
- Mar. 24 Filed Mar. ret. on S&C served on Ewald B. Nyquist on 2-19-75
  - 24 Filed Defts motion for an order dismissing the complaint etc. ret. 4-7-75
- Apr. 4 Filed Plfts. memorandum in support of pltfs. request for a 3-Judge Ct. and in opposition to defts. Nyquist motion to dismiss.
- May 5 Filed Deft., Nyquist, Memorandum of law.
  - 16 Filed Pltfs. reply memorandum.
  - 22 Filed decision & order denying defts. motion to dismiss & granting pltfs. motion to convene a 3-judge Ct. & requesting the Honorable Chief Judge of the U.S. Ct. of Appeal for the 2nd Circuit to convene a 3-judge ct. to hear & determine this cause—Curtin, DJ F-164
  - 30 Filed order designating Judges John T. Curtin, Ellsworth VanGraafeiland & Orrin G. Judd to hear & determine said cause—Irving R. Kaufman, Chief Judge U.S. Ct. of Appeals Second Circuit [\* \* \*]\*

    F-164
- June 3 Filed order that these cases (Civ-75-73 & 74-C-1142) will be heard on 7-22-75 in NYC [\* \* \*]
  - 25 Filed Pltfs. motion to amend complaint and for summary judgment
  - 25 Filed Pltfs. memorandum in support of motions to amend the complaint and for summary judgment.

<sup>†</sup> Additional defendants are not indicated hereafter.

<sup>• [• • •]</sup> indicates that portion of entry regarding filing dates and/or notice and copies to attorneys for parties has been omitted.

# Relevant Docket Entries in Mauclet v. Nyquist

# Date Proceedings

- July 17 Filed Defts'. Memorandum of Law
  - 17 Defts. Notice of Motion and Statement under General Rule 9(g) (motion to dismiss or for summary judgment relates also to 74-Civ-1142 in EDNY and is returnable at Brooklyn)

1976

- Feb. 11 Filed Decision & Order of the Three Judge Court declaring Sec. 661(3) of the New York Education Law unconstitutional and enjoining defts. from its enforcement: directing Defts. to process Pltf. Mauclet's 1974-75 tuition assistance application, etc.—VanGraafeiland, U.S. Circuit Judge, Orrin Judd U.S. Dist. Judge Eastern Dist. of N. Y. & Curtin U.S. Dist. Judge Western Dist. [• •]
  - 11 Filed Judgement that Sect. 661(3) of the N.Y. Education Law is unconstitutional etc. [•••]
    •F-173
- Mar. 12 Filed Defts'. Notice of Appeal to the U.S. Supreme Court
  - 12 Filed Defts'. Affidavit of Service of notice of appeal
- Nov. 8 Filed certified copy of Order of U.S. Supreme Court noting probable jurisdiction Appeal
- Dec. 23 Filed S.P. Application, Pltfs Exhibit "A" before the three Judge Court

# Relevant Docket Entries in Rabinovitch v. Nyquist, et al.†

DATE	FILINGS—PROCEEDINGS	
8- 1-74	Complaint filed. Summons issued	1
8-26-74	Answer of N.U[Y.]. Higher Ed. Ass't. Corp, & Bd of Directors filed.	2
8-29-74	Summons returned & filed./Executed.	3
11-19-74	Answer filed.	6
2-14-75	Suggestion of death of David F. Merrall filed.	7
4- 9-75	Notice of motion ret 4-18-75 for cer- tification of the action as a class ac- tion & for the designation of a three judge court filed.	8
4- 9-75	Affidavit of Gary J. Greenberg & brief in support of pltff's motion for class action, etc. filed.	9/10
4-9-75	Affidavit of service re: notice of motion, Affidavit, & brief, filed.	11
4-18-75	Before Judd, J.—Case called. Pltff's motion for a three judge court marked submitted. Decision reserved.	
4-29-75	Deft's memorandum of law in opposi- tion to motion for three-judge court filed.	12
5-22-75	Memorandum of Law for Deft. Nyquist filed.	13
5/23/75	By Juddy, J.—Memorandum and Order dated 5/23/75 filed that the motion for designation of a three judge court be granted. The court will	

<sup>†</sup> Additional defendants are not indicated hereafter.

# Relevant Docket Entries in Rabinovitch v. Nyquist

DATE	FILINGS—PROCEEDINGS		
	notify the Chief Judge of the Circuit, and that the motion for a class action is denied. Copy of the Order sent to the parties.	14	
5-30-75	Designation of Judges by Ch. J. of C. of A. Kaufman that pursuant to 28 USC 2281 Judge Ellsworth Van-Graafeiland, US Cir. J., US C of A (2nd Cir) and Judge John T. Curtin, USDJ for the Western Dist. of NY to serve in addition to Judge Orrin G. Judd, USDJ/EDNY in this action commencing 5-28-75 filed.	15	
6- 6-75	Copy of an Order dtd 6-3-75 signed by J. Curtin, Dist. J. WDNY re schedule of briefs to be filed.	16	
6- 6-75	Memorandum to J. Judd from J. Curtin (WDNY) filed.	17	
6-23-75	Notice of motion ret 7-3-75 for an order authorizing pltff to serve and file an amended complaint filed.	18	
6-26-75	Interrogatories filed.	19	
7/ 1/75	Notice of Motion, ret. July 22, 1975 filed re: enjoin defts, etc.	(20)	
7/ 1/75	Pltff's Affidavit in Support of Motion for Summary Judgment filed.	(21)	
7/ 1/75	Pltff's Statement under Local Rule 9(g) filed	(22)	
7/ 1/75	Brief in Support of Pltff's Motion for Summary Judgment filed.	(23)	

# Relevant Docket Entries in Rabinovitch v. Nyquist

DATE	FILINGS—PROCEEDINGS	
7- 3-75	Before Judd, J.—Case called. Marked submitted. Decision reserved.	
7- 8-75	Interrogatories to defts filed.	(24)
7- 9-75	Before Judd, J.—Memorandum and Order dtd 7-9-75 granting pitff leave to file an amended complaint etc filed. (p/c)	(25)
7-11-75	Amended complaint filed.	(26)
7–14–75	Deft NY Higher Education Assistance Corp. answers to interrogatories filed.	(27)
7–17–75	By Judd, J.—Notice of hearing dtd 7-15-75 supplementing J. Curtin's order of June 3, 1975 that the hearing will take place in Ctrm. #11 on 7-22-75 at 2:10 p.m. filed.	(28)
7-21-75	Pltff's answer to interrogatories filed.  ([C]opies mailed to judges[.][ ]	(29)
7-21-75	Pltff's reply memorandum filed.	(30)
7-21-75	Notice of motion and memorandum of law to dismiss complaint, ret 7-22-75 at 2:10 P.M. filed.	(31/32)
7–23–75	Before Van Graaferland, C.J.: Curtin, J.: Judd, J.—Case called. Three judge court held on motions for summary judgment and defts motion to dismiss. Motions argued. Decision reserved on all motions.	
7-23-75	Defts memorandum of law filed.	(33)
7–23–75	Affidavit in opposition to motion for summary judgment filed.	(34)

# Relevant Docket Entries in Rabinovitch v. Nyquist

DATE	FILINGS—PROCEEDINGS	
2–17–76	By Van Graafelland, Judd and Curtin—Decision & Order dtd 2-11-76 declaring Section 661(3) unconstitutional and defts are enjoined from its enforcement. Defts are directed to process pltff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to requalify pltff Rabinowitz as a State regents scholarship recipient filed.	(35)
3- 9-76	Notice of appeal filed. Copy to Supreme Ct.	(36)
3-29-76	JUDGMENT dtd 3-26-76 (APPROVED BY VAN GRAAFEILAND, USCJ, JUDD, USDJ, and CURTIN, USDJ/WD NY) that the New York Education Law 661(3) is unconstitutional and the defts are enjoined from its enforcement etc filed.	(37)
3-30-76	Notice of appeal filed. Copy sent to Supreme Court.	(38)
4-14-76	Notice of appeal filed. (pltff)	39
5-28-76	Notice of appeal filed. Copies mailed to Supreme Ct. and pltffs (Defts) (MG)	(40)
6-11-76	ENTIRE FILE CERTIFIED AND MAILED TO THE SUPREME COURT, WASHINGTON C/O CLERK	(40)

Proceedings Before the Single District Judge in Mauclet v. Nyquist

# UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

Index No. Civ-75-73

JEAN-MARIE MAUCLET,

Plaintiff,

VS.

EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendant.

- 1. This is an action for a judgment declaring the invalidity of section 602(2) of the New York State Education Law on the grounds that it unconstitutionally discriminates against resident aliens and conflicts with the constitutional and congressional scheme of comprehensive national regulation of immigration and naturalization. The complaint also requests appropriate injunctive relief restraining the enforcement of this provision of the Education Law.
- 2. This complaint states claims under Article VI (the Supremacy Clause) and the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. § 1983.
- 3. This court has jurisdiction under 28 U.S.C. §§ 1343 (3) and (4).
- 4. This action should be heard and decided by a district court of three judges in accordance with 28 U.S.C. § 2284.

- 5. Plaintiff Jean-Marie Mauclet is a citizen of France, a resident of New York State since April 22, 1969, a permanent resident of the United States since November 18, 1969, and a graduate student at the State University of New York at Buffalo. He is married to a citizen of the United States, and is the father of a United States citizen. Plaintiff began his graduate studies in September 1974 and expects to complete them in June 1976.
- 6. Defendant Ewald B. Nyquist is Commissioner of Education of the State of New York.
- 7. Article 13 of the Education Law of the State of New York establishes a tuition assistance program to provide, in accordance with a statutorily prescribed schedule of need, awards of up to \$600 a year to undergraduate and graduate college students matriculated in state approved institutions and programs. Defendant Nyquist is responsible for the administration of the tuition assistance program.
  - 8. Section 602(2) of the Education Law provides:

    "Citizenship. An applicant (a) must be a citizen of
    the United States, or (b) must have made application
    to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to
    apply for United States citizenship as soon as he has
    the qualifications, and must apply as soon as eligible."
- 9. Plaintiff has submitted an application for a tuition assistance program award for the academic year 1974-75. He satisfies all requirements for an award except for the requirement governing citizenship. Although he is presently qualified to apply for citizenship and intends to reside permanently in the United States, he does not wish

#### Complaint

to relinquish his French citizenship at this time. His pending application for a tuition assistance program award will not be processed by the State Department of Education until he files a Petition for Naturalization and provides the Department of Education with the date of filing and number of the petition.

- 10. Section 602(2) of the Education Law denies to resident aliens the equal protection of the laws guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1983. It also conflicts with the constitutional and congressional scheme of comprehensive national regulation of immigration and naturalization.
- 11. Plaintiff will suffer irreparable harm unless section 602(2) of the Education Law is declared invalid and unless defendant Nyquist is enjoined from enforcing it and is ordered to resume processing plaintiff's application for a tuition assistance program award for the academic year 1974-75.

Wherefore, Plaintiff requests that this court:

- (1) take jurisdiction of this matter and convene a statutory court of three judges pursuant to 28 U.S.C. §§ 2281 et seq.;
- (2) issue a judgment declaring section 602(2) of the Education Law invalid;
- (3) enjoin defendant Nyquist from enforcing section 602(2) of the Education Law and order him to process plaintiff's application for a tuition assistance program award for the academic year 1974-75;
- (4) award attorney fees and costs to plaintiff;

(5) grant such other and further relief as may be just and equitable.

Respectfully submitted,

Kevin Kennedy Kevin Kennedy 1520 Genesee Building Buffalo, New York 14202 716-856-9090

MICHAEL DAVIDSON
John Lord O'Brian Hall
State University of New York
Amherst Campus
Buffalo, New York 14260
716-636-2071

# Decision and Order of John T. Curtin, District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

## [SAME TITLE]

The plaintiff, a graduate student at the State University of New York at Buffalo, has been a resident of New York State since April 1969 and has been a permanent United States resident since November 1969. He is a French citizen.

Plaintiff challenges the constitutionality of New York Education Law § 602.2 en the grounds that it unconstitutionally discriminates against resident aliens and conflicts with the constitutional and congressional scheme of comprehensive national regulation of immigration and naturalization. The plaintiff, who has submitted an application for a tuition assistance program award for the academic year 1974-75, satisfies all requirements for an award except for citizenship. He moves for the convening of a three-judge court and for declaratory and injunctive relief.

Defendant has moved to dismiss the complaint on the ground that plaintiff's claim is insubstantial. A claim is insubstantial only if frivolous or "if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." Goosby v. Osser, 409 U.S. 512, 518 (1973). Under this standard, defendant's motion to dismiss must be denied and plaintiff's motion to convene a three-judge court granted.

Alienage has been held to be a suspect classification. See, e.g., Graham v. Richardson, 403 U.S. 365 (1971). Statutes that treat aliens differently from citizens require a great degree of precision. Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (New York flat statutory prohibition

Decision and Order of John T. Curtin, District Judge

against the employment of aliens in the competitive classified civil service unconstitutional). In Jagnandin v. Giles, 379 F. Supp. 1178 (N.D. Miss. 1974), a three-judge court invalidated a Mississippi statute which classified all alien students as non-residents for purposes of charging tuition and fees. A Virgin Islands law which barred non-citizen residents the right to participate in the Territorial Scholarship Fund solely by reason of their alienage was also held to be unconstitutional. Chapman v. Gerard, 456 F.2d 577 (3d Cir. 1972). The Chapman court discarded the argument, as have other courts, that participation in the scholarship fund is a privilege and not a right. See also Shapiro v. Thompson, 394 U.S. 618 (1969).

Applying the guidelines given in Goosby v. Osser, supra, and Nieves v. Oswald, 477 F.2d 1109 (2d Cir. 1973), the court finds that the complaint of the plaintiff does raise a substantial constitutional question within the meaning of the three-judge court statute.

Accordingly, the Honorable Chief Judge of the United States Court of Appeals for the Second Circuit is hereby requested to convene a three-judge court to hear and determine this cause.

So ordered.

JOHN T. CURTIN United States District Judge

Dated: May 22, 1975.

#### FOOTNOTE

- <sup>1</sup> Section 602.2 provides the following eligibility requirements and conditions governing awards:
  - 2. Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (3) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible.

(McKinney's Supp. 1975)

Proceedings Before the Single District Judge in Rabinovitch v. Nyquist

#### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

CLASS ACTION COMPLAINT 74 Civ. 1142

ALAN RABINOVITCH, on behalf of himself and on behalf of all others similarly situated; namely, all residents of New York State who have been or may be denied New York State Regents Scholarships, scholar incentive assistance awards and loans administered by the New York Higher Education Assistance Corporation solely on the basis of their status as aliens,

Plaintiffs,

#### against

EWALD B. NYQUIST, Commissioner of Education of the State of New York, the University of the State of New York, the Board of Regents of the State of New York, the New York Higher Education Assistance Corporation and Willard C. Allis, Dr. Ernest Boyer, Dr. Judah Cahn, Wilmot R. Craig, Thomas P. Denn, Walter A. Kassenbrock, Norma Kershaw, Rev. Laurence J. McGinley, S.J., David F. Merrall, William G. Morton and Russel N. Service, being the members of the board of directors of said corporation,

Defendants.

#### Introductory Statement

1. This is a class action brought under the Fourteenth Amendment to the Constitution of the United States, the Supremacy Clause of the Constitution and federal statu-

tory provisions against Ewald B. Nyquist. Commissioner of Education, the University of the State of New York. the Board of Regents, the New York Higher Education Assistance Corporation and its Board of Directors. Plaintiff Alan Rabinovitch is a Canadian citizen and a resident alien lawfully admitted to permanent residence in the United States; he has been a resident of New York State since his arrival in the United States in 1964. The class he represents includes all lawfully admitted resident aliens residing in New York State who have been or may be denied New York State Regents Scholarships, scholar incentive assistance awards and loans administered by the New York Higher Education Assistance Corporation solely on the basis of their status as aliens. Plaintiffs challenge the provisions of Section 602(2) of New York's Education Law and Item 6 of the loan application of the New York Higher Education Assistance Corporation which preclude them from receiving Regents Scholarships, scholar incentive assistance awards, and student loans. This action is brought in the name of plaintiff Alan Rabinovitch who was denied a Regents Scholarship solely on the basis of his status as an alien.

### Jurisdiction

2. Jurisdiction is premised on 28 U.S.C. §§ 1331(a), 1343(3), 2201 and 2202, the Fourteenth Amendment to the United States Constitution and Article VI (the Supremacy Clause) of the United States Constitution, in that (a) this is an action to recover damages and secure declaratory and injunctive relief to prevent the deprivation of rights, privileges and immunities secured to plaintiffs by the Constitution and by federal law and (b) the rights of each member of the plaintiff class at issue are valued in excess of \$10,000, exclusive of interest and costs.

#### Complaint

# Three-Judge Court

- 3. Under 28 U.S.C. § 2281 a three-judge court is required to adjudicate this case because plaintiffs challenge the validity of a state statute and a state rule of general application on federal constitutional grounds. The state statute and state rule are of general application throughout New York State. In addition, a state officer is a party defendant; injunctive relief is sought; and a substantial federal constitutional issue is raised.
- 4. Plaintiffs hereby request that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified pursuant to 28 U.S.C. § 2284 of the pendency of this action and of plaintiffs' demand for injunctive relief in order that the necessary designation of judges for the three-judge court can be made.

#### Venue

5. Plaintiff Alan Rabinovitch resides at 1468 East 89th Street, Brooklyn, New York, within the Eastern District of New York. Venue is based on the named plaintiff's residence.

#### Class Action Allegations

- 6. The named plaintiff brings this action in his own behalf and on behalf of all other persons similarly situated, pursuant to subsection (2) of Rule 23(b) of the Federal Rules of Civil Procedure.
- 7. The class which plaintiff represents constitutes all resident aliens lawfully admitted to permanent residence in the United States who (a) reside in the State of New

#### Complaint

York; (b) have not acquired and do not intend to seek or apply for United States citizenship; and (c) are or may be otherwise entitled to Regents Scholarships, scholar incentive assistance awards and/or loans administered by the New York Higher Education Assistance Corporation.

- 8. The class is so numerous that joinder of all members is impracticable.
- 9. The class is affected by common questions of law and fact in that all who are otherwise qualified are denied Regents Scholarships, scholar incentive assistance awards and/or education loans pursuant to state law solely because of their status as aliens. The constitutional and statutory issues raised by the said denials of scholarships, awards and/or loans are precisely the same as regards each member of the class.
- 10. The named plaintiff's claims are typical of the claims of the class. His claim has a factual and legal basis substantially like those of other members of the class in that he was denied a Regents Scholarship solely because of his status as an alien.
- 11. The named plaintiff will fairly and adequately protect the interests of the class since he is a resident alien; his claims are co-extensive with those of the class; and he is represented in this action by counsel experienced in the conduct of similar litigation.
- 12. The defendants have acted and refused to act pursuant to state law with reference to the named plaintiff on grounds applicable to all members of the class by refusing to grant him a Regents Scholarship solely on the basis of his status as an alien.

# Parties

- 13. Plaintiff Alan Rabinovitch, the named member of the class, lives at 1468 East 89th Street, Brooklyn, New York, and at all times relevant was and is a Canadian citizen lawfully admitted to the United States as a permanent resident alien. At all times herein relevant he was and is a resident of the United States and of the State of New York.
- 14. Defendant Ewald B. Nyquist is Commissioner of Education of the State of New York and as such is charged with the selection of scholarship recipients based on criteria and standards which, among other criteria and standards, are imposed by the New York Education Law, specifically by Section 602(2) of that law. More generally, as chief executive officer of the New York State system of education and of the Board of Regents of New York, he is charged pursuant to Section 305(1) of the Education Law with enforcement of all general and special laws relating to the educational system of the State.
- 15. Defendant University of the State of New York ("USNY") is a not for profit corporation duly incorporated in the State of New York. Pursuant to its charter and the powers vested in it by Sections 201 and 604 of the Education Law, as exercised by its agents, it is charged with the encouragement and promotion of education in New York State through the distribution and regulation of its corporate funds.
- 16. Defendant Board of Regents of the State of New York is a body created by state law. Pursuant to the powers granted to it by Section 604 of the Education Law, it is charged with creating the rules and procedures gov-

erning the application and qualification of candidates for Regents Scholarships and scholar incentive awards. More generally, the Board of Regents, pursuant to Section 202 of the Education Law, exercises all governing and corporate powers of defendant USNY.

- 17. Defendant New York Higher Education Assistance Corporation ("NYHEAC") is a not for profit corporation duly incorporated in the State of New York. Pursuant to its charter and the powers granted to it by Sections 650 and 651 of the Education Law, it is authorized to grant and guaranty student loans.
- 18. Defendants Willard C. Allis, Dr. Ernest Boyer, Dr. Judah Cahn, Wilmot R. Craig, Thomas P. Denn, Walter A. Kassenbrock, Norma Kershaw, Rev. Laurence J. McGinley, S.J., David F. Merrall, William G. Morton and Russel N. Service are all members of the board of directors of defendant NYHEAC and are here sued individually and in their capacities as directors of said corporation. (Defendant Nyquist serves, by virtue of his position as Commissioner of Education, as an ex officio member of the board of directors of NYHEAC.) The board of directors of NYHEAC is charged by Section 653 of the Education Law with the responsibility for the adoption of rules and regulations governing the application for and granting of loans made by said corporation.

#### Facts

19. As a result of the January 1973 Regents Qualifying Examinations, in or about April 1973, plaintiff Alan Rabinovitch was informed by defendants USNY and the Board of Regents that he was qualified and entitled to receive a Regents Scholarship and incentive assistance from the State of New York.

#### Complaint

- 20. In or about May 1973, plaintiff Alan Rabinovitch received from defendants USNY and the Board of Regents forms relating to his family's financial status and an application for American citizenship. He completed and returned the financial forms but did not complete the citizenship application.
- 21. In or about September 1973, plaintiff Rabinovitch was advised that the offer of a Regents Scholarship had been withdrawn on the sole ground that, since he did not intend to become a citizen of the United States, Section 602 of the Education Law precluded his receipt of the Regents Scholarship. (A copy of said notice is annexed hereto as Exhibit A.)
- 22. The named plaintiff has been a permanent resident of the United States and of New York State since 1964. He is a product of the New York City public school system, having graduated from Bildersee Junior High School (J.H.S. #68) and Canarsie High School. He graduated from high school in June 1973. Since September 1973 he has been enrolled as a full time student at Brooklyn College majoring in psychology. As a result of the action of the defendants and because of New York State law, plaintiff Rabinovitch is attending Brooklyn College without the benefit of the Regents Scholarship to which he is entitled.
- 23. Upon his eighteenth birthday, some two years ago, plaintiff Rabinovitch registered with the Selective Service System at Local Board #38, 271 Cadman Plaza East, Brooklyn, New York. He and all members of his family have regularly paid federal, state and city income and excise taxes. Plaintiff Rabinovitch, by virtue of his status as a lawfully admitted resident alien residing in New York State, incurs all of the obligations and bears virtually all

of the responsibilities as are incurred and borne by citizens of the United States and New York State.

- 24. Plaintiff Rabinovitch and his entire family are Canadian citizens. It is plaintiff Rabinovitch's present intention to continue to reside in the United States and in New York State. However, he intends to retain his Canadian citizenship and does not intend to seek naturalization as an American citizen.
- 25. In January 1974 and again in March 1974, the attorneys for plaintiff Rabinovitch wrote to defendants' representatives requesting that he receive the scholarship funds to which he was entitled. Both of the letters brought forth a negative response. Defendants refused to award plaintiff Rabinovitch his Regents Scholarship or pay the funds due him solely because he was an alien and New York State law precluded the payment of scholarship monies to aliens.

## First Claim for Relief

- 26. Defendants rely upon New York State Education Law, Section 602(2), for authority to impose the citizenship requirement upon the plaintiffs as a prerequisite to their receipt of Regents Scholarship and other scholar incentive assistance awards. The statute provides:
  - "An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications and must apply as soon as eligible."
- 27. Defendants rely upon Item 6 of the Student's Application for Loan Guarantee form to deny plaintiffs loans

#### Complaint

administered by NYHEAC. Item 6 provides:

"When a student is not a U.S. Citizen or National a letter must be attached to the application by a student stating the type of visa that is held and a statement that it is the intention of the writer to become a citizen as soon as legally possible. Persons who are in this country on an "F" student visa or a visitors visa are not eligible for a loan."

(A copy of the form is attached hereto and denominated Exhibit B.)

- 28. Defendants under color of New York law, provide to certain persons residing within the jurisdiction of the State of New York Regents Scholarships, scholar incentive assistance awards and student loans, but deny these same benefits to other persons equally residing within the jurisdiction of New York State and equally qualified to receive such benefits solely on the basis that the latter class are aliens. In so acting defendants rely on the aforequoted statute and loan application criterion. Defendants have thereby created arbitrary classifications of persons before the law in violation of plaintiffs' rights to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.
- 29. The aforequoted citizenship restrictions are beyond the powers under the Fourteenth Amendment to the United States Constitution of the New York State Legislature and NYHEAC to impose in that the said restrictions have no reasonable relationship to any interest which the Legislature or Corporation is constitutionally entitled to protect. The conclusive presumptions supporting the restrictions are not necessarily or universally true in fact. The citizenship restrictions are thus void as in violation of plaintiffs' guaranty to substantive due process of law

within the meaning of the Fourteenth Amendment to the United States Constitution.

- 30. The citizenship requirements contained in Section 602(2) of the Education Law and Item 6 of the NYHEAC loan application form are, under the Supremacy Clause of the United States Constitution, beyond the powers of the New York State Legislature and NYHEAC to impose in that said requirements unduly encroach on the exclusive power of the federal government to regulate immigration and alien residence, since they impose significant burdens upon aliens lawfully admitted to permanent residence within the United States and cause such individuals to suffer an unlawful handicap and discrimination after lawful entry to the United States without the sanction of federal law in direct contravention of federal policy any constitutional power.
- 31. Insofar as Item 6 of the NYHEAC loan application form exceeds the requirements proscribed by 45 C.F.R. § 177.2 it is void as contrary to federal regulation.

# Second Claim for Relief

32. By reason of the actions of the named plaintiff and his attorneys, especially the prosecution of this litigation, which actions have been in the public interest and for the benefit of the plaintiff class, the attorneys for plaintiff Rabinovitch and the class he represents are entitled to an award of reasonable counsel fees from defendants to compensate them for their time, effort, initiative and service on behalf of the public interest and the plaintiff class.

Wherefore, plaintiff Alan Rabinovitch and the plaintiff class which he represents, pray for an order of this Court:

1. Declaring that New York Education Law Section 602(2) and Item 6 of the NYHEAC loan application form

#### Complaint

are unconstitutional and null and void and are of no legal force and effect; or, in the alternative, declaring that the said Item 6 is void as contrary to federal regulation as prescribed in 45 C.F.R. § 177.2.

- 2. Permanently enjoining defendants from (a) enforcing Section 602(2) of the Education Law and Item 6 of the NYHEAC loan application form and (b) refusing to grant Regents Scholarships, scholar incentive assistance awards and loans administered by NYHEAC to any applicant on the ground that, though a resident alien living in New York State, the applicant is not a United States citizen and does not intend to acquire citizenship status.
- 3. Requiring that defendants strike all references to the citizenship requirement from their application forms, brochures, literature and the like and requiring that defendants take affirmative action to overcome the effects of their past practices by giving notice to the public, especially high school, college and graduate students, indicating that resident aliens are eligible for Regents Scholarships, scholar incentive assistance awards and student loans.
- 4. Directing that defendants forthwith process, without regard to the provisions of Section 602(2) of the Education Law and Item 6 of the NYHEAC loan application, the applications for Regents Scholarships, scholar incentive assistance awards and NYHEAC loans filed by the named plaintiff and by all members of the plaintiff class who, subsequent to June 14, 1971, filed such applications which were denied on the sole ground that the applicant was an alien.
- 5. Directing the defendants to pay plaintiff Alan Rabinovitch the amount of money to which he was entitled under the Regents Scholarship program for the 1973-74 school year plus interest.

- 6. Directing the defendants to pay all members of the plaintiff class as identified pursuant to paragraph 4 above, the amount of money each was entitled to under the Regents Scholarship and scholar incentive assistance award programs for each school year beginning with the 1971-72 school year plus interest.
- 7. Awarding the attorneys for plaintiff Rabinovitch and the plaintiff class reasonable attorneys fees as fixed by the court to be paid by defendants.
- 8. Granting the named plaintiff the costs of this action and such other and further relief as to the Court may seem just and proper in the premises.

Dated: New York, New York, August 1, 1974.

STROOCK & STROOCK & LAVAN GARY J. GREENBERG STEPHEN BLOCK 61 Broadway New York, New York 10006 425-5200

Burt Neuborne
American Civil Liberties Union
Foundation Inc.
22 East 40th Street
New York, New York 10016

By Gary J. Greenberg Attorneys for Plaintiffs

# Letter from Loretta Picarillo to Mrs. Leo Rabinovitch, Exhibit "A" to Complaint

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

REGENTS EXAMINATION AND SCHOLARSHIP CENTER
STUDENT FINANCIAL AID SECTION
99 Washington Avenue
Albany, New York 12210

September 19, 1973

Mrs. Leo Rabinovitch 1468 East 89th Street Brooklyn, New York 11236

Re: 73-RC-5763

Alan Rabinovitch

Dear Mrs. Rabinovitch:

Your recent letter to this Center regarding Alan's Regents College Scholarship and his citizen status, has been referred to me for reply.

I am sorry to advise you that it is necessary that we withdraw the offer of a Scholarship, since you indicate Alan does not intend to become a citizen of the United States. The Scholarship will be reawarded to the next alternate on the list who must also meet the citizenship requirements.

The law governing eligibility requirements for awards requires that an applicant for financial assistance (if not a citizen of the United States), must apply for citizenship, if he is eligible to do so.

If I can be of any further assistance, please do not hesitate to contact me. In all future correspondence, please refer to Alan's identification number above.

Very truly yours,

Loretta Picarillo (Mrs.)

# Student's Application for Loan Guarantee, Exhibit "B" to Complaint (Excerpts)

## NEW YORK HIGHER EDUCATION CORPORATION 50 Wolf Road Albany, New York 12205

#### STUDENT'S APPLICATION FOR LOAN GUARANTEE

- I. INSTRUCTIONS FOR ROUTING OF APPLICATION FORM
- 1. Student submits completed application in triplicate to Educational Institution.
- Educational Institution completes Part B and forwards the application in duplicate to the Lender or the Student.
- 3. Lender, selected by the Student, receives the application from the Educational Institution or from the Student, reviews the information submitted, consults with Student concerning repayment of the loan, makes recommendation and forwards application to NYHEAC.
- 4. NYHEAC notifies Student, Lender and Educational Institution of loan disposition.
- II. Instructions for Completing Part A—Identification Data

Clarification of Specific Items in Part A:

Item 6: When a student is not a U.S. Citizen or National a letter must be attached to the application by a student stating the type of visa that is held and a statement that it is the intention of the writer to become a citizen as soon as legally possible. Persons who are in this country on an "F" student visa or a visitors visa are not eligible for a loan.

# Application for Loan Guarantee, Exhibit "B" to Complaint.

- Item 8: When a student is supporting anyone other than his children the box after "Other" should indicate the number of dependents or additional dependents and an explanation is required, for example, mother, father, in-laws.
- Item 22: When a student is employed it is necessary that he check whether he is employed on a full or part-time basis.
- Item 23: When the student's spouse is also a student and employed the same information is required.
- Item 26: Statement of Adjusted Family Income—When a student is currently living with parents or a parent or has lived with them at any time during the preceding 12 month period, the parents income must be indicated and must be considered even if the student is paying room and board and regardless of the student's age.

In determining if the student has been a recipient of an amount in excess of \$600 from one or both parents, loans from the parents must be included.

- Item 26A & B: These [adjusted gross income of parents and/or student] are figures for the immediately preceding tax year. Refer to your last income tax return and indicate exact amounts.
- Item 26D: Permits only 10% of the amount of adjusted gross income even though on your tax return you may have had a larger deduction.
- Item 26E: From the Federal tax return you filed you will clearly see the dollar amount that was permitted to be deducted.

# Application for Loan Guarantee, Exhibit "B" to Complaint

- Item 27: "Home Equity" is your estimate of the current market value of your home minus whatever mortgage amount is still outstanding.
- Item 32: "Non-taxable income" under this item include social security, G.I. Benefits, Aid to Dependent Children, Welfare payments or any other non-taxable items.
- Items 36 & 37: If you have any information to provide concerning either of these items [Additional Educational Expenses and Extraordinary Family Expenses and situations], please do so in a letter made out in triplicate so that one copy is attached to each of these completed forms.
- Items 47 & 48: "Credit and Character References" must be responsible employed individuals who have known you for a period of time and who would be able to provide information concerning character as well as knowing something about your credit potential. This is an application for a loan and you are agreeing to repay the loan plus interest.

Before your parents sign this form be sure they read the certification and note that the student should not sign the form except in the presence of a notary where he will swear to the complete statement concerning the application.

#### III. GENERAL INSTRUCTIONS

To qualify for a loan, a student must have a sincere sense of responsibility toward repayment of a loan and must be:

 A bona fide resident of New York State for one year prior to submitting an application. (A

# Application for Loan Guarantee, Exhibit "B" to Complaint

student who resides in New York solely for the purpose of attending school is not eligible for a loan.)

- Enrolled in or accepted for admittance as a full-time student at an approved college or an approved vocational school.
- A. Eligibility for interest benefits is determined by the school following an approved needs method which will take into account a) adjusted family income, b) family assets, number of children in school and total number of dependents. If you do not wish to have the school do a "needs" determination and are willing to pay interest during the time you are in school, in Part B please write over the printing in Section III, "Not applying for Federal Interest Benefits" and sign your name. However, Sections I and II must be completed.
- B. It is the responsibility of the student and his family to provide the educational institution with all pertinent information and any additional educational expenses depending on the number of children attending various types of schools as well as extraordinary circumstances attending the family, if any.

# Answer of New York Higher Education Assistance Corporation

# UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NEW YORK

#### [SAME TITLE]

The defendants, The New York Higher Education Assistance Corporation and Willard C. Allis, Dr. Ernest Boyer, Dr. Judah Cahn, Wilmot R. Craig, Thomas P. Denn, Walter A. Kassenbrock, Norma Kershaw, Rev. Laurence J. McGinley, S.J., David F. Merrall, William G. Morton and Russell N. Service, being the members of the board of directors of said corporation, answering the complaint:

First: Deny knowledge or information sufficient to form a belief as to the allegations, and each of them contained in the paragraphs thereof designated "1", "2", "3", "5", "7", "9", "10", "11", "12", "13", "19", "20", "21", "22", "23" and "24".

Second: Deny the allegations, and each of them contained in the paragraphs thereof designated "8", "25", "26", "28", "29", "30", "31" and "32".

Wherefore, these defendants demand judgment dismissing the complaint as to them with costs.

McNamee, Lochner, Titus & Williams, P.C. 75 State Street Albany, New York 12201 Tel. 518 434 3136

# Answer of New York Higher Education Assistance Corporation

By: Earl H. Gallup, Jr.
Attorneys for Defendants, The New York
Higher Education Assistance Corporation,
and Willard C. Allis, Dr. Ernest Boyer,
Dr. Judah Cahn, Wilmot R. Craig, Thomas
P. Denn, Walter A. Kassenbrock, Norma
Kershaw, Rev. Laurence J. McGinley, S.J.,
David F. Merrall, William G. Morton and
Russell N. Service, being the members of
the board of directors of said corporation.

Cullen & Dyrman 177 Montague Street Brooklyn, New York 11201 Tel. 855 9000 Of Counsel

## Answer of Nyquist, the University of the State of New York and the Board of Regents of the State of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

# [SAME TITLE]

Defendants, Ewald B. Nyquist, Commissioner of Education of the State of New York, The University of State of New York and the Board of Regents of the State of New York, answering the complaint herein by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, respectfully allege:

FIRST: Deny knowledge or information sufficient to form a belief as to each and every allegation in paragraph "1" except admit that plaintiffs purport to bring this action under the Fourteenth Amendment to the Constitution of the United States, the Supremacy Clause of the Constitution and federal statutory provisions against Ewald B. Nyquist, Commissioner of Education, the University of the State of New York, the Board of Regents, the New York Higher Education Assistance Corporation and its Board of Directors, that plaintiffs define said class as all those lawfully admitted resident aliens residing in New York State who have been or may be denied New York State Regents Scholarships, scholar incentive assistance awards and loans administered by the New York Higher Assistance Corporation solely on the basis of their status as aliens, that plaintiffs challenge the provisions of Section 602(2) of New York's Education Law and Item 6 of the loan application of the New York Higher Education Assistance Corporation which preclude them from receiving

# Answer of Nyquist, USNY and the Board of Regents

Regents Scholarships, scholar incentive assistance awards, and student loans, and that this action is brought in the name of plaintiff Alan Rabinovitch who was denied a Regents Scholarship solely on the basis of his status as an alien.

Second: Deny each and every allegation in paragraph "2" insofar as said paragraph alleges that 28 U.S.C. §§ 1331(a), 1343(3), 2201 and 2202, the Fourteenth Amendment to the United States Constitution and Article VI (the Supremacy Clause) of the United States Constitution provide a basis for the Court's jurisdiction except deny information or knowledge sufficient to form a belief as to whether the rights of each member of the purported plaintiff class at issue are valued in excess of \$10,000, exclusive of interest and costs and admit that plaintiffs bring this action to recover camages and secure declaratory and injunctive relief to prevent what they allege is the deprivation of rights, privileges and immunities secured to plaintiffs by the Constitution and by federal law.

Third: Deny each and every allegation in paragraph "3" insofar as said paragraph alleges that a three-judge court is required to adjudicate this case because a substantial federal constitutional issue is raised.

FOURTH: Deny each and every allegation in paragraph "4" insofar as that paragraph is based on the allegation that a three-judge court must be convened.

FIFTH: Deny each and every allegation in paragraphs "6" and "7" insofar as those paragraphs allege that a class action may be maintained in this case.

Sixth: Deny each and every allegation in paragraph "8".

Answer of Nyquist, USNY and the Board of Regents

Seventh: Deny each and every allegation in paragraph "9" except admit that Regents Scholarships and scholar incentive assistance awards are denied unless an applicant is a citizen, has made application for citizenship or intends to apply for citizenship if eligible and lack knowledge or information sufficient to form a belief about education loans.

Eighth: Deny each and every allegation in paragraph "10" except admit that the named plaintiff was denied a Regents Scholarship because he is not a citizen, has not made an application for citizenship and does not intend to apply for citizenship.

NINTH: Deny knowledge or information sufficient to form a belief as to each and every allegation in paragraph "11".

TENTH: Deny each and every allegation in paragraph "12" except admit that state defendants, pursuant to state law, have refused to grant plaintiffs a Regents Scholarship because he is neither a citizen nor has he made application for citizenship nor does he intend to apply for citizenship.

ELEVENTH: Deny knowledge or information sufficient to form a belief as to each and every allegation in paragraph "13" except admit that plaintiff Alan Rabinovitch lives at 1468 East 89th Street, Brooklyn, New York.

TWELFTH: With respect to paragraph "14" admit that defendant Ewald B. Nyquist is Commissioner of Education of the State of New York and chief executive officer of the New York State system of education and of the Board of Regents of New York and that the New York Education Law § 602(2) relates to the selection of Scholarship

Answer of Nyquist, USNY and the Board of Regents

recipients and that § 305(1) relates to the enforcement of all general and special laws relating to the educational system of the State but respectfully refer the Court to the complete text of those sections.

THIRTEENTH: With respect to paragraph "15" admit that defendant University of the State of New York ("USNY") is a not for profit corporation duly corporated in the State of New York and that the Education Law, §§ 201 and 604 relate to its duty and that of its agents to encourage and promote education in New York State through the distribution and regulation of its corporate funds but respectfully refer the court to the complete text of those sections.

FOURTEENTH: With respect to paragraph "16" admit that defendant Board of Regents of the State of New York is a body created by state law and admit that the Education Law, § 604 relates to the Board's creating rules and procedures governing the application and qualification of candidates for Regents Scholarships and scholar incentive awards but respectfully refer the court to the complete text of said section and admit that the Education Law, § 202 relates to the Board's exercise of the governing and corporate powers of defendant USNY but respectfully refer the Court to the complete text of said section.

FIFTEENTH: Deny knowledge or information sufficient to form a belief as to each and every allegation in paragraphs "17" and "18", and respectfully refer the Court to the answer of those defendants.

SIXTEENTH: Deny knowledge or information sufficient to form a belief as to each and every allegation in paragraphs "19", "20", "22", "23", "24" and "27".

Answer of Nyquist, USNY and the Board of Regents

SEVENTEENTH: Admit each and every allegation in paragraph '25" except deny that defendants refused to award plaintiff Rabinovitch his Regents Scholarship or pay the funds due him solely because he was an alien because defendants refused to award plaintiff a scholarship because he failed to comply with Education Law § 602(2).

EIGHTEENTH: Admit each and every allegation in paragraph "28" except deny knowledge or information sufficient to form a belief as to loan application criterion and deny that such benefits are denied on the basis that some persons are aliens insofar as defendants grant scholarships to aliens, otherwise qualified who have made application for citizenship or file a statement of intent to make such application when eligible and deny that defendants have thereby created arbitrary classifications of persons before the law and in violation of plaintiffs' rights to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

NINETEENTH: Deny each and every allegation in paragraphs "29" and "30" except deny knowledge or information sufficient to form a belief as to item 6 of the NYHEAC loan application form and respectfully refer the Court to the answer of the defendant NYHEAC.

TWENTIETH: Deny knowledge and information sufficient to form a belief as to each and every allegation in paragraph "31".

TWENTY-FIRST: Deny each and every allegation in paragraph "32".

Answer of Nyquist, USNY and the Board of Regents

As and for a first separate and distinct defense, the State defendants allege:

TWENTY-SECOND: The court lacks jurisdiction over the subject matter.

As and for a second separate and distinct defense, the State defendants allege:

TWENTY-THIRD: The complaint fails to state a cause of action upon which relief can be granted.

As and for a third separate and distinct defense, the State defendants allege:

TWENTY-FOURTH: The Education Law § 602(2) complies with the Supremacy Clause of the United States Constitution.

As and for a fourth separate and distinct defense, the State defendants allege:

TWENTY-FIFTH: The Education Law § 602(2) complies with the Fourteenth Amendment to the United States Constitution.

As and for a fifth separate and distinct defense, the State defendants allege:

TWENTY-SIXTH: The defendants, the University of the State of New York and the Board of Regents of the State of New York are not persons within the meaning of the Civil Rights Act and therefore are not amenable to suit under that act.

Answer of Nyquist, USNY and the Board of Regents

Wherefore, State defendants pray for judgment in their favor dismissing the action and awarding them costs, or, in the alternative, a declaration that Education Law, § 602(2) is constitutional.

Dated: New York, New York October 11, 1974

Respectfully submitted,

Attorney General of the
State of New York
Attorney for Defendants
Ewald B. Nyquist, The University of State of the State
of New York and The Board
of Regents

By
/s/ Judith A. Gordon
Judith A. Gordon
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7400

# Memorandum and Order of Orrin G. Judd, District Judge

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

# [SAME TITLE]

Dated: May 23, 1975

#### Appearances:

STROOCK & STROOCK & LAVAN, Esqs. Attorneys for Plaintiff

By: Gary J. Greenberg, Esq. Gregory K. Marks, Esq. of Counsel

Hon. Louis J. Lefkowitz
Attorney General of the State
of New York
Attorney for Defendant Ewald B. Nyquist

By: Robert S. Hammer, Esq.
Assistant Attorney General
of Counsel

McNamee, Lochner, Titus & Williams, P.C.

By: Earl H. Gallup, Jr., Esq. of Counsel and

Cullen & Dykman, Esqs.
Attorneys for Defendants New York Higher
Education Assistance Corporation, et al.

# Memorandum and Order of Orrin G. Judd, District Judge

JUDD, J.

#### Memorandum and Order

Plaintiffs have moved for the convening of a three-judge court and for certification of the case as a class action.

#### Facts

The complaint seeks injunctive relief against Section 602(2) of the New York Education Law. Plaintiff's attack is based on the claim that he was disqualified for a New York State Regents Scholarship although he won a competitive test, because he is an alien who does not intend to apply for American citizenship. Plaintiff has been lawfully admitted to permanent residence within the United States and has resided in New York since 1964.

The claim for class action certification is based on the assertion that plaintiff knows five individuals who have been denied educational assistance funds because of their status as aliens and that the census figures indicate that there may be as many as 200,000 resident aliens who might seek the benefit of the statutes under attack.

#### Discussion

- 1. Jurisdiction of the action exists under 28 U.S.C. § 1343(3), without the necessity of establishing the jurisdictional amount of \$10,000. *Hagans* v. *Lavine*, 415 U.S. 528, 535-36, 94 S.Ct. 1372, 1380 (1974).
- 2. In determining the necessity for a three-judge court, the issue is whether plaintiff's claim is "wholly insubstantial," *Bailey* v. *Patterson*, 369 U.S. 31, 33, 82 S.Ct. 594, 551 (1962), or whether "its unsoundness so obviously results from previous decisions of [the Supreme Court] as

# Memorandum and Order of Orrin G. Judd, District Judge

to foreclose the subject." Ex parte Poresky, 290 U.S. 30, 32, 54 S.Ct. 3, 4 (1933). See also Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 858 (1973); Rosenthal v. Board of Education, 497 F.2d 726 (2d Cir. 1974).

The United States Supreme Court has recently held that alienage is not a valid reason for states to deny various benefits to persons.

In Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848 (1971), the court struck down state statutes barring noncitizens or, in one case, those who had not been residents for fifteen years, from categorical assistance. It held that "classifications based on alienage, like those based on nationality, or race, are inherently suspect and subject to close judicial scrutiny." 403 U.S. at 372, 91 S.Ct. at 1852. It expressly rejected the argument that the "special public interest," i.e., the "State's desire to preserve limited welfare benefits for its own citizens," justified restricting benefits to citizens and longtime residents. The court also suggested that such state statutes conflict with the "complete scheme of regulation" governing the qualifications for entry and status of immigrants which the federal government has enacted pursuant to its constitutional authority. 403 U.S. at 378, 91 S.Ct. at 1855.

In Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2844 (1973), the court voided a New York law barring noncitizens from permanent competitive positions in the state civil service, even though the "record does not disclose that any of the four appellees ever took any steps to attain United States citizenship." 413 U.S. at 638, 93 S.Ct. at 2845. Though the holding rested somewhat on the fact that the classification was both over and underinclusive with regard to the purported state purpose of limiting government service to those fully aware of American mores, the court cited Graham and basically decided that the state had failed to advance a forceful reason for employing a sus-

# Memorandum and Order of Orrin G. Judd, District Judge

pect classification. 413 U.S. at 642-46, 93 S.Ct. at 2848-49. It noted the various obligations of membership in the political community which resident aliens fulfill, and replied to the argument that resident aliens are more likely to leave the state at some time by quoting the lower court's view that the state would be "hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years . . . would be a poorer risk for a career position in New York . . . than an American citizen." 413 U.S. at 645, 93 S.Ct. 2849, quoting 339 F. Supp. 906, 909.

In In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851 (1973), the court invalidated a Connecticut statute which disqualified even permanent resident aliens from membership in the bar. It said that "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." 413 U.S. at 722, 93 S.Ct. at 2855. The court found that the state had not proffered any persuasive justification.

The Supreme Court now has before it three cases bearing on the issues in this case. In Mow Sun Wong v. Hampton, 500 F.2d 1031 (9th Cir. 1974), cert. granted, 94 S.Ct. 3067, the lower court voided as violative of due process a regulation of the United States Civil Service Commission barring non-citizens from competitive positions. In Weinberger v. Diaz, 361 F. Supp. 1 (S.D. Fla. 1973) (three-judge court), prob. juris. noted, 94 S.Ct. 2381 (1974), the lower court invalidated the exclusion of aliens who have not been continuous residents for five years from a supplemental medical insurance plan enacted as part of Medicare. And in Ramos v. United States Civil Service Commission, 376 F. Supp. 361 (D. P.R. 1974) (three-judge court), appeal filed August 30, 1974, No. 74-216, the lower

# Memorandum and Order of Orrin G. Judd, District Judge

court held, after Sugarman, that the federal government could not exclude resident aliens from civil service employment or from eligibility for federal disaster relief loans.

The New York statute in question here was sustained by a state court in *Friedler* v. *University of New York*, 70 Misc.2d 444, 333 N.Y.S.2d 928 (Sup. Ct. Erie Co. 1972). This decision predated all the Supreme Court cases outlined above, except for *Graham*, which was not cited. It does not oblige this court to view plaintiffs' claim as "wholly insubstantial."

The issue in the case at bar was not decided in Spatt v. New York, 361 F. Supp. 1048 (E.D.N.Y. 1973), aff'd, 94 S.Ct. 563 (1973), which merely upheld the requirement that Regents Scholarships be used at institutions within New York State. That case did not involve alienage, was decided on the "rational basis" test, and depended on specific purposes advanced by the state in support of the particular law.

No United States Supreme Court case has decided the effect of alienage on the right to public grants for higher education. In light of the Supreme Court cases outlined above, the basic issue in this case may be whether there is something about Regents Scholarships which sufficiently differentiates them from licensure in a profession, or eligibility for civil service employment, or public assistance. so that a state's discrimination against aliens would be permissible. It may be that scholarships are less vital to existence than a job or welfare grants, or it may be that the state can cite some compelling purpose which the classification advances. But the Supreme Court cases cited above, far from foreclosing a challenge to this statute. provide an array of philosophical and practical arguments militating against the constitutionality of this type of classification. It is therefore necessary to request the

## Memorandum and Order of Orrin G. Judd, District Judge

convening of a three-judge court, pursuant to 28 U.S.C. § 2281.

Plaintiffs' proposed amendment of the complaint to refer to the modified New York statute (L. 1974, c. 942) will not affect the conclusion in this memorandum.

3. The motion for class action status is based on the assertion that the class is a large one, but gives little attention to the requirement of F.R.Civ.P. 23(b)(3) that the court find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Apart from the fact that four students in the Buffalo area have brought actions attacking the statute within the last three years, the only evidence of the size of the class is based on estimates from census figures.

Certifying the matter as a class action requires some identification of the members of the class and provision for notice at the expense of plaintiffs. Eisen v. Carlyle, 417 U.S. 156, 94 S.Ct. 2140 (1974). Class action procedure is therefore a cumbersome method, which is not particularly helpful where the issue is one of the constitutionality of a statute. Any decision of the legal issues in this case will have stare decisis effect, even more so if this case is consolidated with the case pending before Judge Curtin in the Western District of New York. Mauclet v. Nyquist, Civ. 75-73. The plaintiff in this case will not graduate until mid-1977. It is probable that the case will be decided on the merits before then. In this case no real necessity has been shown for treating the case as a class action.

It is Ordered that the motion for the designation of a three-judge court be granted. The court will notify the Chief Judge of the Circuit.

It is further Ordered that the motion for class action status be denied.

ORRIN G. JUDD U. S. D. J. Proceedings Before the Three-Judge Court for the Western and Eastern Districts of New York in Mauclet v. Nyquist and Rabinovitch v. Nyquist

# Order directing that Mauclet v. Nyquist and Rabinovitch v. Nyquist be heard together

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,

Plaintiff,

-vs-

EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendant.

#### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

74-C-1142

ALAN RABINOVITCH, on behalf of himself and on behalf of all others similarly situated; namely, all residents of New York State who have been or may be denied New York State Regents Scholarships, etc.,

Plaintiffs,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, The University of the State of New York, et al.,

Defendants.

# Order on Hearing

These cases will be heard together on July 22, 1975 in New York City, the exact location not yet determined.

Briefs in these cases shall be submitted on the following schedule. Plaintiffs' briefs shall be filed not later than Friday, June 27, 1975. Defendants' responses shall be filed not later than Monday, July 14, 1975. Any reply briefs shall be received no later than Friday, July 18, 1975. A copy of each brief shall be forwarded to each judge on the panel.

So ordered.

JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: June 3, 1975.

# Motion to Amend Complaint and for Summary Judgment on Behalf of Jean-Marie Mauclet

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MAPIE MAUCLET,

Plaintiff,

\_\_vs\_\_

EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendant.

Please take notice that plaintiff will move this Court on July 22, 1975, in New York, New York, at a time and place to be designated by the Court, for orders:

- 1. Granting, pursuant to Rule 15 of the Federal Rules of Civil Procedure, leave to amend the complaint by
  - a) adding as a party defendant the New York State Higher Education Services Corporation, an educational corporation within the Department of Education, which, on July 1, 1975, succeeds to the powers of the Commissioner of Education in the administration of student financial aid programs, and
  - b) amending paragraphs one (1) and eight (8) of the body of the complaint, and paragraphs two (2) and three (3) of the "wherefore" clause of the complaint, to show that as of July 1, 1975, that section 602(2) of the Education Law has been renumbered and reenacted verbatim as section 661(3) of the Edu-

# Motion to Amend Complaint and for Summary Judgment— Mauclet v. Nyquist

cation Law, and that plaintiff seeks a judgment invalidating both sections 602(2) and 661(3) of the Education Law;

2. Granting, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment declaring the unconstitutionality of sections 602(2) and 661(3) of the Education Law and ordering the Commissioner of Education or the New York State Higher Education Services Corporation, whichever may be appropriate, to process plaintiff's pending application for a tuition assistance program award for the academic year 1974-75.

This motion is supported by an affidavit of the plaintiff, Jean-Marie Mauclet, and a memorandum of law.

Dated: June 20, 1975.

Respectfully submitted,

Kevin Kennedy 1520 Genesee Building Buffalo, New York

Michael Davidson John Lord O'Brian Hall State University of New York Amherst Campus Buffalo, New York 14260

Attorneys for Plaintiff

To: Douglas Cream
Assistant Attorney General
65 Court Street
Buffalo, New York 14202

# Affidavit of Jean-Marie Mauclet in Support of Motion for Summary Judgment

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

# [SAME TITLE]

STATE OF NEW YORK SS.

JEAN-MARIE MAUCLET, being duly sworn, deposes and says:

- 1. I am the plaintiff in the above entitled action and I submit this affidavit in support of my motion for summary judgment.
  - 2. I am a French citizen.
- 3. I have been a resident of New York State since April 22, 1969, and a permanent resident of the United States since November 18, 1969.
- 4. I am married to a United States citizen, and our child is a United States citizen.
- 5. I am a graduate student at the State University of New York at Buffalo. I began my graduate studies in September, 1974 and I expect to complete them in June, 1976.
- 6. At the end of July 1974, I submitted a timely application, pursuant to Article 13 of the Education Law, for a tuition assistance program award for the academic year 1974-75. I applied for, and believe that I am entitled to, the maximum award of \$600 for the academic year 1974-75.

#### Mauclet Affidavit

- 7. I satisfy all requirements for a maximum award except the requirement of citizenship.
- 8. Although I am presently qualified to apply for citizenship and intend to reside permanently in the United States, I do not wish to relinquish my French citizenship at this time.
- 9. I have been informed by the State Education Department that my application for a tuition assistance program award will not be processed until I file a Petition for Naturalization and provide the Department of Education with the date of filing and number of the petition.
- 10. The State University of New York has established a scholarship program known as the State University Scholarship Fund to assist full-time students, including graduate students, at the State University. Under this program, scholarships are provided to students who are eligible for the maximum tuition assistance program authorized by the Education Law. A student who is eligible for scholarship assistance is entitled to receive, in addition to a tuition assistance program award, the difference between the full amount of his tuition and the amount of his tuition assistance program award. The total of these two kinds of tuition assistance amounts to a full tuition scholarship.
- 11. My tuition for the academic year 1974-75 was \$1200. If I had been eligible to receive a tuition assistance program award of \$600, I would have been entitled to receive a State University Scholarship of \$600. The citizenship requirement of the Education Law serves to render me ineligible both for a tuition assistance program award and a State University Scholarship.
- 12. At the beginning of the 1974-75 academic year I applied for and received a student loan from the Erie County

# Mauclet Affidavit

Savings Bank in the amount of \$2500. This loan is guaranteed by the New York Higher Education Assistance Corporation. The proceeds of the loan were paid to me through the Bursar of the State University of New York who deducted \$651.20 from the full amount of the loan and paid \$1848.80 to me. The deduction of \$651.20 included \$600 for payment of half my tuition charges for the academic year. The other half of my tuition charges I subsequently paid under protest out of my student loan funds. Additionally, I now owe the Erie County Savings Bank \$2500, the full amount of my student loan, and I am obligated to begin repaying this loan when I complete my studies.

13. On information and belief, French and United States citizens are treated alike in French universities. There are no tuition charges in French universities, and the right to attend a university free of charge is a right enjoyed by United States citizens as well as French citizens.

Wherefore, plaintiff requests that a judgment be entered declaring sections 602(2) and 661(3) of the Education Law invalid, providing appropriate injunctive relief to require defendants to complete the processing of plaintiff's pending application for a tuition assistance program for the academic year 1974-75, and retaining jurisdiction to consider applications for any further orders which may be necessary to secure complete relief.

(Sworn to by Jean-Marie Mauclet on June 20, 1975.)

# Amended Complaint in Rabinovitch v. Nyquist (Excerpts)

# UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

74 Civ. 1142 (OGJ)

#### ALAN RABINOVITCH,

Plaintiff,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, The University of the State of New York, The Board of Regents of the State of New York, The New York State Higher Education Services Corporation and the Nine Individual Members of the Board of Trustees of Said Corporation, namely Does I through VI and ex officio Ewald B. Nyquist, Ernest L. Boyer and Robert J. Kibbee and the President of Said Corporation (the unnamed individuals being unknown to plaintiff),

Defendants.

# Introductory Statement

1. This is an action brought under the Fourteenth Amendment to the Constitution of the United States, the Supremacy Clause of the Constitution and federal statutory provisions against Ewald B. Nyquist, Commissioner of Education, the University of the State of New York, the Board of Regents, the New York State Higher Education Services Corporation and its Board of Trustees and President. Plaintiff Alan Rabinovitch is a Canadian citizen and a resident alien lawfully admitted to permanent

# Amended Complaint-Rabinovitch v. Nyquist

residence in the United States; he has been a resident of New York State since his arrival in the United States in 1964. Plaintiff challenges the constitutionality of Section 661(3) of New York's Education Law which precludes him from receiving academic performance awards, including Regents Scholarships, tuition assistance program awards, and student loans. This action is brought by plaintiff Alan Rabinovitch who was denied a Regents Scholarship solely on the basis of his status as an alien.

#### Venue

5. Plaintiff Alan Rabinovitch resides at 5945 Shore Parkway, Brooklyn, New York, within the Eastern District of New York. Venue is based on the plaintiff's residence.

#### Pariies

- 6. Plaintiff Alan Rabinovitch lives at 5945 Shore Parkway, Brooklyn, New York, and at all times relevant was and is a Canadian citizen lawfully admitted to the United States as a permanent resident alien. At all times herein relevant he was and is a resident of the United States and of the State of New York.
- 7. Defendant Ewald B. Nyquist is Commissioner of Education of the State of New York and as such is charged by Section 602 of the Education Law with the duty of (1) selecting academic performance award recipients and (2) promulgating regulations defining the terms by which the President of the New York State Higher Education Services Corporation can determine a student's eligibility for student aid and loan programs. He is charged with enforc-

## Amended Complaint-Rabinovitch v. Nyquist

ing Section 661(3) of the Education law in carrying out his duties under Section 602. More generally, as chief executive officer of the New York State system of education and of the Board of Regents of New York, he is charged pursuant to Section 305(1) of the Education Law with enforcement of all general and special laws relating to the educational system of the State.

- 8. Defendant University of the State of New York ("USNY") is a not for profit corporation duly incorporated in the State of New York. Pursuant to its charter and the powers vested in it by Section 201 of the Education Law, as exercised by its agents, it is charged with the encouragement and promotion of education in New York State through the distribution and regulation of its corporate funds.
- 9. Defendant Board of Regents of the State of New York is a body created by state law. The Board of Regents, pursuant to Section 202 of the Education Law, exercises all governing and corporate powers of defendant USNY.
- 10. Defendant New York State Higher Education Services Corporation ("NYSHESC") is an educational corporation created by Section 652 of the Education Law in the State Education Department and within the USNY under the Board of Regents for the purposes set out in Section 652, to wit, the administration of all of the New York State financial aid and loan programs for students of approved institutions of higher education as defined by the Education Law and the regulations promulgated by Commissioner Nyquist.
- 11. The defendant members of the Board of Trustees of NYSHESC (nine in number, Education Law § 652(3))

## Amended Complaint-Rabinovitch v. Nyquist

are here sued individually and in their capacities as Trustees of said corporation. Plaintiff has been unable to identify six of those individuals and has designated them Does I through VI. The other three trustees serve ex officio; they are Commissioner of Education Ewald B. Nyquist, Chancellor of the State University of New York Ernest L. Boyer and Chancellor of the City University of the City of New York Robert J, Kibbee. Under Section 652(3) of the Education Law, the Board of Trustees of NYSHESC is the governing body of said corporation and exercises all of its corporate powers. (See also Section 653, Education Law.)

12. The unnamed defendant President of NYSHESC is here sued individually and in his capacity as chief executive officer of said corporation. (See Section 654, Education Law.) Pursuant to Section 655 of the Education Law, he is responsible for administering for NYSHESC all of the student financial aid and loan programs of the State of New York.

#### Facts

- 13. As a result of the January 1973 Regents Qualifying Examinations, in or about April 1973, plaintiff Alan Rabinovitch was informed by defendants USNY and the Board of Regents that he was qualified and entitled to receive a Regents Scholarship and incentive assistance (now denominated tuition assistance).
- 14. In or about May 1973, plaintiff Alan Rabinovitch received from defendants USNY and the Board of Regents forms relating to his family's financial status and an application for American citizenship. He completed and returned the financial forms but did not complete the citizenship application.

# Amended Complaint-Rabinovitch v. Nyquist

15. In or about September 1973, plaintiff Rabinovitch was advised that the offer of a Regents Scholarship had been withdrawn on the sole ground that, since he did not intend to become a citizen of the United States, then Section 602(2) (now Section 661(3)) of the Education Law precluded his receipt of the Regents Scholarship. (A copy of said notice is annexed hereto as Exhibit A.)

16. The plaintiff has been a permanent resident of the United States and of New York State since 1964. He is a product of the New York City public school system, having graduated from Bildersee Junior High School (J.H.S. #68) and Canarsie High School. He graduated from high school in June 1973. Since September 1973 he has been enrolled as a full time student at Brooklyn College majoring in psychology. As a result of the action of the defendants and because of New York State law, plaintiff Rabinovitch is attending Brooklyn College without the benefit of the Regents Scholarship to which he is entitled by virtue of his performance on the competitive examination and without the benefit of the tuition assistance available to all non-alien college students in New York State (Section 667, Education Law).

17. Upon his eighteenth birthday, nearly three years ago, plaintiff Rabinovitch registered with the Selective Service System at Local Board #38, 271 Cadman Plaza East, Brooklyn, New York. He and all members of his family have regularly paid federal, state and city income and excise taxes. Plaintiff Rabinovitch, by virtue of his status as a lawfully admitted resident alien residing in New York State, incurs all of the obligations and bears virtually all of the responsibilities as are incurred and borne by citizens of the United States and New York State.

# Amended Complaint-Rabinovitch v. Nyquist

- 18. Plaintiff Rabinovitch and his entire family are Canadian citizens. It is plaintiff Rabinovitch's present intention to continue to reside in the United States and in New York State. However, he intends to retain his Canadian citizenship and does not intend to seek naturalization as an American citizen.
- 19. In January 1974 and again in March 1974, the attorneys for plaintiff Rabinovitch wrote to defendants' representatives requesting that he receive the scholarship funds to which he was entitled. Both of the letters brought forth a negative response. Defendants refused to award plaintiff Rabinovitch his Regents Scholarship and pay the funds due him solely because he was an alien and New York State law precluded the payment of scholarship monies to aliens.
- 20. Plaintiff Rabinovitch has completed two years of study at Brocklyn College. He intends to complete his course of study for a Bachelor's Degree and presently is considering attending graduate school. Plaintiff Rabinovitch believes he may require student loans to help cover the cost of his education. But for the provisions of 661(3) of the Education Law he would be entitled to receive such additional financial aid. Under present New York law he is barred from receiving a student loan simply because of his status as an alien.

#### First Claim for Relief

21. Defendants relied in 1973-74 upon New York State Education Law, Section 602(2), and now rely upon renumbered Section 661(3), for authority to impose the citizenship requirement upon the plaintiff as a prerequisite to his receipt of a Regents Scholarship, tuition assistance

#### Amended Complaint-Rabinovitch v. Nyquist

and student loans. The statute as it reads today provides:

"An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship."

(The last two words of the statute were added by Section 661(3); they do no appear in Section 602(2). Otherwise the two sections are identical.)

- 22. Defendants under color of New York law, provide to certain persons residing within the jurisdiction of the State of New York academic performance awards (e.g., Regents Scholarships), tuition assistance program awards and student loans, but deny these same benefits to other persons equally residing within the jurisdiction of New York State and equally qualified to receive such benefits solely on the basis that the latter class are aliens. In so acting defendants rely on the aforequoted statute. Defendants have thereby created arbitrary classifications of persons before the law in violation of plaintiff's right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.
- 23. The aforequoted citizenship restriction is beyond the powers under the Fourteenth Amendment to the United States Legislature to impose in that the said restriction has no reasonable relationship to any interest which the Legislature is constitutionally entitled to protect. The conclusive presumptions supporting the restriction are not necessarily or universally true in fact. The citizenship restriction is thus void as in violation of plaintiff's guaranty to substantive due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

# Amended Complaint-Rabinovitch v. Nyquist

- 24. The citizenship requirement contained in Section 661(3) of the Education Law (formerly Section 602(2)) is, under the Supremacy Clause of the United States Constitution, beyond the powers of the New York State Legislature to impose in that said requirement unduly encroaches on the exclusive power of the federal government to regulate immigration and alien residence, since it imposes significant burdens upon aliens lawfully admitted to permanent residence within the United States and causes such individuals to suffer an unlawful handicap and discrimination after lawful entry to the United States without the sanction of federal law in direct contravention of federal policy and constitutional power.
- 25. Insofar as Section 661(3) of the Education Law exceeds the requirements proscribed by 45 C.F.R. § 177.2 it is void as contrary to federal regulation.

#### Second Claim for Relief

26. By reason of the actions of the plaintiff and his attorneys, especially the prosecution of this litigation, which actions have been in the public interest and for the benefit of all similarly situated resident aliens in New York State, the attorneys for plaintiff Rabinovitch are entitled to an award of reasonable counsel fees from defendants to compensate them for their time, effort, initiative and service on behalf of the public interest.

Wherefore, plaintiff Alan Rabinovitch prays for an order of this Court:

1. Declaring that New York Education Law Section 661(3) is unconstitutional and null and void and of no legal force and effect; or, in the alternative, declaring that the

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#### Amended Complaint-Rabinovitch v. Nyquist

said statute as it applies to federally assisted loans is void as contrary to federal regulation as prescribed in 45 C.F.R. § 177.2.

- 2. Permanently enjoining defendants from (a) enforcing Section 661(3) of the Education Law and (b) refusing to grant plaintiff a Regents Scholarship, tuition assistance and student loans on the ground that, though a resident alien living in New York State, the applicant is not a United States citizen and does not intend to acquire citizenship status.
- 3. Requiring that defendants strike all references to the citizenship requirement from their application forms, brochures, literature and the like and requiring that defendants take affirmative action to overcome the effects of their past practices by giving notice to the public, especially high school, college and graduate students, indicating that resident aliens are eligible for academic performance awards, including Regents Scholarships, tuition assistance program awards and student loans.
- 4. Directing that defendants forthwith process, without regard to the provisions of Section 661(3) of the Education Law, the application for a Regents Scholarship and tuition assistance filed by plaintiff.
- 5. Directing the defendants to pay plaintiff Alan Rabinovitch the amount of money to which he was entitled under the Regents Scholarship and tuition assistance programs for the 1973-74 and 1974-75 school years plus interest, and ordering them to pay plaintiff the funds he is entitled to under said programs for the 1975-76 school year and all future school years.

#### Amended Complaint-Rabinovitch v. Nyquist

- 6. Awarding the attorneys for plaintiff Rabinovitch reasonable attorneys' fees as fixed by the court to be paid by defendants.
- 7. Granting the plaintiff the costs of this action and such other and further relief as to the court may seem just and proper in the premises.

Dated: New York, New York, July 11, 1975.

STROOCK & STROOCK & LAVAN GARY J. GREENBERG GREGORY K. MARKS 61 Broadway New York, New York 10006 (212) 425-5200

Burt Neuborne
American Civil Liberties Union
Foundation, Inc.
22 East 40th Street
New York, New York 10016

By GARY J. GREENBERG Attorneys for Plaintiff

# Letter from Loretta Picarillo to Mrs. Leo Rabinovitch, Exhibit "A" to Amended Complaint

Exhibit "A" to the Amended Complaint is reproduced at p. 25, ante.

# Motion for Summary Judgment and Preliminary Injunction on Behalf of Alan Rabinovitch

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

#### [SAME TITLE]

SIRS:

Please take notice that pursuant to Rules 56 and 65, Fed. R. Civ. P., and the June 3, 1975 order of Judge Curtin for the three-judge district court, plaintiff will move this court on July 22, 1975, at a time and place (in New York City) to be determined by the court for summary judgment and for preliminary injunctive relief. Plaintiff will move the court for summary judgment.

- 1. declaring Section 661(3) of the Education Law unconstitutional;
  - 2. enjoining defendants from enforcing said statute;
- requiring defendants to process plaintiff's application for a Regents Scholarship and tuition assistance filed in May 1973;
- 4. requiring defendants to award plaintiff his Regents Scholarship and tuition assistance:

#### Motion for Summary Judgment and Preliminary Injunction—Rabinovitch v. Nyquist

- 5. requiring defendants to pay plaintiff the amount of money to which he will be entitled under said programs for the 1975-76 school year and all future years in which he satisfies the requisite criteria (other than citizenship);
- 6. ordering defendants to give notice of the fact that henceforth aliens will not be barred from receiving any form of financial assistance for higher education by notifying all high schools and institutions of higher education (public and private) located in New York State; and
- 7. ordering defendant New York State Higher Education Services Corporation ("NYSHESC") to pay plaintiff the Regents Scholarship and tuition assistance funds to which he was entitled for the 1973-74 and 1974-75 school years.

In addition plaintiff will ask the court to enter a preliminary injunction requiring defendant NYSHESC to place in escrow and trust for the benefit of plaintiff the sum of \$2,500 to cover the Regents Scholarship and tuition assistance funds to which plaintiff will be entitled for the 1975-76 and 1976-77 school years if he prevails in this litigation.

Dated: New York, New York June 27, 1975

STROOCK & STROOCK & LAVAN

By Gary J. Greenberg Gary J. Greenberg Attorneys for Plaintiff 61 Broadway New York, New York 10006 (212) 425-5200

# Motion for Summary Judgment and Preliminary Injunction—Rabinovitch v. Nyquist

To: Louis J. Lefkewitz
Attorney General of the
State of New York
Two World Trade Center
New York, New York 10047

Cullen & Dyrman 177 Montague Street Brooklyn, New York 12201

McNamee, Lochner, Titus & Williams, P.C. 75 State Street
Albany, New York 12201

# Statement pursuant to Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York in Support of Motion for Summary Judgment

#### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

#### [SAME TITLE]

Pursuant to Local Rule 9(g) of the Rules of this Court, plaintiff submits the following statement of material facts as to which he contends there is no dispute.

- 1. Plaintiff is a citizen of Canada, lawfully admitted to the United States for permanent residence.
- 2. Plaintiff is a resident of New York State, living in Brooklyn, New York. He has resided in New York ever since his admission to the United States as a resident alien in 1964.
- 3. Plaintiff attends Brooklyn College, having commenced his studies at that institution in September 1973. He has successfully completed two years of study, and has two more years of college ahead of him in order to receive the Bachelor's Degree.
- 4. Plaintiff intends to complete his work for the Bachelor's Degree and then intends to pursue a graduate degree.
- 5. Plaintiff intends to retain his Canadian citizenship and does not intend to become a naturalized American, but plaintiff does intend to continue to reside in New York.

# Rule 9(g) Statement in Support of Rabinovitch Motion for Summary Judgment

- 6. But for Section 661(3) of the Education Law, plaintiff is fully qualified to receive a Regents Scholarship, tuition assistance and student loans pursuant to Articles 13 and 14 of the Education Law.
- 7. Plaintiff took the January 1973 Regents Qualifying Examinations. In or about April 1973, he was informed in writing by the defendants University of the State of New York ("USNY") and the Board of Regents that, as a result of his performance on the competitive Regents Qualifying Examinations, he was qualified and entitled to receive a Regents Scholarship and incentive assistance (now termed tuition assistance).
- 8. In or about May 1973, plaintiff received from the defendants USNY and the Board of Regents forms relating to his family's financial status, and an application for American citizenship. He completed and returned the financial forms, but did not complete the citizenship application.
- 9. In or about September 1973, plaintiff was advised in writing that the offer of a Regents Scholarship had been withdrawn on the sole ground that, since he did not intend to become a citizen of the United States, Section 602 of the Education Law precluded his receipt of a Regents Scholarship. (A copy of that letter is attached as Exhibit A to the plaintiff's affidavit.) (Section 602 has been renumbered as Section 661(3) of the Education Law.
- 10. Defendants refused to grant plaintiff his Regents Scholarship or tuition assistance or pay any money to him solely because he is not an American citizen and does not intend to apply for citizenship and New York State's

# Rule 9(g) Statement in Support of Rabinovitch Motion for Summary Judgment

Education Law precludes the payment of financial aid funds to aliens.

11. As a result of the action of the defendants and because of New York State law, plaintiff is attending Brooklyn College without the benefit of the Regents Scholarship and without the benefit of the tuition assistance available to all non-alien college students in New York State. In addition, he is not eligible for student loans.

Dated: New York, New York June 27, 1975

STROOCK & STROOCK & LAVAN

By s/ Gary J. Greenberg GARY J. GREENBERG 61 Broadway New York, New York 10006 (212) 425-5200

Attorneys for Plaintiff

# Affidavit of Alan Rabinovitch in Support of Motion for Summary Judgment

#### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

# [SAME TITLE]

STATE OF NEW YORK SS.:

ALAN RABINOVITCH, being duly sworn deposes and says:

- 1. I am the plaintiff in this action. I submit this affidavit in support of the motion for summary judgment which is being made in my behalf. I am personally familiar with the matters set forth herein all of which are based on my own personal knowledge.
- 2. I was born on October 16, 1954 in Montreal, Canada. I am a Canadian citizen. Indeed, all members of my immediate family hold Canadian citizenship.
- 3. I was lawfully admitted to the United States as a permanent resident alien in 1964. At all times subsequent to my entry into the United States, I have been a permanent resident of the United States and of the State of New York.
- I currently reside at 5945 Shore Parkway, Brooklyn, New York, 11236.
- 5. I am a product of the New York City public school system, having attended Bildersee Junior High School (J.H.S. No. 68) and Canarsie High School. I graduated from the latter school in June, 1973.

#### Rabinovitch Affidavit

- 6. Since September 1973, I have been enrolled as a full time student at Brooklyn College majoring in psychology.
- 7. I took the January 1973 Regents Qualifying Examinations. In or about April 1973, I was informed in writing by the defendants University of the State of New York ("USNY") and the Board of Regents that, as a result of my performance on the competitive Regents Qualifying Examinations, I was qualified and entitled to receive a Regents Scholarship and incentive assistance (now termed tuition assistance).
- 8. In or about May 1973, I received from the defendants USNY and the Board of Regents forms relating to my family's financial status, and an application for American citizenship. I completed and returned the financial forms, but did not complete the citizenship application.
- 9. My family consists of my mother and father, a younger sister and myself. The family income, including money earned by me, amounts to about \$11,000 per year.
- 10. Although it was in May 1973 and continues to be my intention to reside in the United States and in New York State, I then intended and currently intend to retain my Canadian citizenship. Accordingly, I did not in May 1973 apply for naturalization as an American citizen, and do not presently intend to apply for American citizenship.
- 11. In or about September 1973, I was advised in writing that the offer of a Regents Scholarship had been withdrawn on the sole ground that, since I did not intend to become a citizen of the United States, Section 602 of the Education Law precluded my receipt of a Regents Scholarship. (A copy of that letter is attached as Exhibit A.) (I am advised by my attorney that Section 602 has been re-

#### Rabinovitch Affidavit

numbered and that under the new statute the citizenship restriction appears in Section 661(3) of the Education Law.)

- 12. After receiving Exhibit A, I decided to consult an attorney in order to ascertain what my rights and remedies, if any, were and to learn whether I could receive the funds which were being denied to me and which were of importance to me and my family.
- 13. In January 1974 and again in March 1974, my attorneys wrote to defendants' representatives requesting that I receive the scholarship funds to which I believe I am entitled. Both of those letters brought forth a negative response. Defendants refused to grant me my Regents Scholarship or tuition assistance or pay any money to me. They did so solely because I am not an American citizen and do not intend to apply for citizenship and New York State's Education Law precludes the payment of financial aid funds to aliens.
- 14. As a result of the action of the defendants and because of New York State law, I am attending Brooklyn College without the benefit of the Regents Scholarship to which I believe I am entitled by virtue of my performance on the competitive examination and without the benefit of the tuition assistance available to all non-alien college students in New York State.
- 15. While I do not wish to be understood to be in any way disparaging the quality of Brooklyn College, I believe the court should know that because I am disqualified from receiving any form of financial aid from New York State, I am required to attend a public college within New York City. Without financial assistance my family and I are not able to afford the tuition charged by New York's private

# Rabinovitch Affidavit

colleges. Also I am required to live in my parents' home because without financial aid we can not afford the expense involved in my attending college at either a private or public university located outside New York City.

- 16. I have completed two years of study at Brooklyn College. I intend to complete my course of study for a Bachelor's Degree, and I presently intend to go on to graduate school, perhaps to seek a Master's Degree in social work. I believe I may require student loans to help cover the cost of my education. I understand that student loans are available to all New York State residents, except aliens, without regard to the location of the university one attends. Under present New York law, I am barred from receiving a student loan simply because of my status as an alien.
- 17. Upon my eighteenth birthday, nearly three years ago, I registered with the Selective Service System at Local Board #38, 271 Cadman Plaza East, Brooklyn, New York. I and all members of my family have regularly paid federal, state and city income and excise taxes.

(Sworn to by Alan Rabinovitch on June 24, 1975.)

# Answers to New York Higher Education Assistance Corporation's Interrogatories to Alan Rabinovitch

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

#### [SAME TITLE]

Plaintiff Alan Rabinovitch answers the Interrogatories served upon his counsel by defendant New York Higher Education Assistance Corporation ("NYHEAC") as follows:

1. Have you ever filed an application for financial assistance with regard to your educational expenses, including an application for a NYHEAC loan; and if so, give the details of such application including the name of the firm or organization with whom the application was filed, the date of filing and the amount of assistance or loan sought. If any application was approved, give the details thereof and the amount of funds which were awarded or loaned to you.

#### ANSWER:

Plaintiff has never filed an application for a NYHEAC loan. Plaintiff filed an application for a Regents Scholarship and tuition assistance in or about May 1973. Said application was filed with defendants University of the State of New York and the Board of Regents. That application was denied even though plaintiff satisfied all other criteria because of his status as an alien. Plaintiff also filed an application with Brooklyn College for a work-study grant for the summer of 1975 which application was granted. (For additional details as to the latter see answer to interrogatory 11.)

#### Answer to NYHEAC Interrogatories— Rabinovitch v. Nyquist

2. Have you ever had an application for a NYHEAC loan rejected and if so, state the name of the person or firm rejecting such application, the date of rejection; and if any reason was given for such rejection, supply the details thereof.

#### ANSWER:

No.

3. What is your date of birth?

#### ANSWER:

October 16, 1954.

4. What is your marital status?

#### ANSWER:

Single.

5. What is your permanent street address?

#### ANSWER:

5945 Shore Parkway, Brooklyn, New York 11236.

6. How long have you been a resident of New York State?

#### ANSWER:

Eleven years.

7. Do you have an alien registration receipt card Form I-151; and if so, what is the date of issuance of said card?

#### ANSWER:

Yes, June 27, 1964.

#### Answer to NYHEAC Interrogatories— Rabinovitch v. Nyquist

8. What is the name of the educational institution which you are attending?

#### ANSWER:

Brooklyn College.

What is the current year of study in which you are engaged?

#### ANSWER:

Two years have been completed. Plaintiff will commence his third year of study in September 1975.

10. What is your expected date of graduation? Answer:

June 1977.

11. Are you employed; and if so, what is the name and address of your employer, the hours or days of employment and the wages earned?

#### ANSWER:

Yes: Brooklyn College (Library), Ave. H and Glenwood Road, Brooklyn, New York. Plaintiff works 40 hours per week. Plaintiff's present employment is a summer job given to him by Brooklyn College under a work-study program. His compensation for the summer will be \$850.

12. Have any other members of your family applied for loans guaranteed by NYHEAC; and if so, state what are their names and addresses?

#### ANSWER:

No.

#### Answer to NYHEAC Interrogatories— Rabinovitch v. Nyquist

13. Have you during the preceding twelve months resided with, been claimed as a dependent for federal income tax purposes by, or been the recipient of an amount in excess of \$600.00 from one or both of your parents?

#### ANSWER:

Plaintiff resides with his parents, is supported by them and is claimed as a dependent on his parents' income tax return.

14. If the answer to the foregoing question is "Yes", give the details including the names and addresses of your parents.

#### ANSWER:

Mr. and Mrs. Leo Rabinovitch, 5945 Shore Parkway, Brooklyn, New York 11236.

- 15. If the answer to interrogatory "13" is "Yes" give the following information:
- a. Adjusted gross income from tax returns for the last taxable year of your father and mother and yourself:
- The number of personal exemptions claimed on tax returns by your mother and father;
- c. Whether or not you were claimed as an exemption on tax returns filed by your mother and father;
- d. The equity in any home owned by your father and mother;
- e. The equity in any real estate owned by your mother and father;
- f. The total quality in any business owned by your mother and father;

#### Answer to NYHEAC Interrogatories— Rabinovitch v. Nyquist

- g. The balance of all checking and savings accounts of yourself, your mother and father;
- h. All other investments of yourself, your mother and father;
- Any non-taxable income of yourself, your mother and your father;
- j. The amount of federal income tax paid by yourself, your mother or father.

#### ANSWER:

- a. \$12,678;
- b. 4;
- c. Yes;
- d. The family rents an apartment and has no interest in any home;
  - e. The family owns no real estate;
  - f. The family owns no business;
- g. There are no checking accounts. The family savings account has a balance of \$1,000;
  - h. None;
  - i. None;
  - j. \$1,336.80.
- 16. Are there any other children of your mother and father attending college and if so, state their names, place of residence and educational expenses attributable to each.

#### Answer:

None.

#### Answer to NYHEAC Interrogatories— Rabinovitch v. Nyquist

17. If you are married, answer the previous questions dealing with assets and income insofar as the same may relate to your spouse.

#### ANSWER:

Not applicable.

18. What are your debts; and if any, supply the name and address of the creditor, and nature of the debt and the unpaid balance.

#### ANSWER:

None.

19. What is the name and address of an adult person with whom you have frequent contact?

#### ANSWER:

Assuming the question means a non-family member, that is to say, someone who could serve as a reference, plaintiff states that such an individual would be his former English teacher at Canarsie High School, Mr. Fred Powers. The school is located at 1600 Rockaway Blvd., Brooklyn, New York.

Dated: New York, New York July 17, 1975

STROOCK & STROOCK & LAVAN

By s/ Gary J. Greenberg Gary J. Greenberg Attorneys for Plaintiff 61 Broadway New York, New York 10006 212-425-5200

(Verified by Alan Rabinovitch on July 17, 1975.)

# Defendants' Motion to Dismiss the Complaints or for Summary Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 Civ. 1142(OGJ)

ALAN RABINOVITCH,

Plaintiff,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Defendants.

# UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

Notice of Motion

Civ-75-73(JTC)

JEAN-MARIE MAUCLET,

Plaintiff,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Defendants.

SIRS:

PLEASE TAKE NOTICE, upon the annexed statement under General Rule 9(g) of the District Court for the Eastern District of New York, the affidavit of J. Wilmer Mirandon,

# Defendants' Motion to Dismiss the Complaints or for Summary Judgment

sworn to July 15, 1975, and upon all the pleadings and prior proceedings had herein, the undersigned will move these statutory district courts at the United States Courthouse, Courtroom 11, 225 Cadman Plaza East, Borough of Brooklyn, City of New York at 2:10 o'clock in the afternoon, or as soon thereafter as counsel may be heard, for an order pursuant to Fed. R. Civ. P., Rules 12(b)(1)(6); (c); (h)(3) and 56(b) dismissing the complaints, or in the alternative granting summary judgment for the defendants, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York July 16, 1975

Yours, etc.,

Louis J. Lefkowitz
Attorney General of the
State of New York
By:
s/ Robert S. Hammer
Robert S. Hammer
Assistant Attorney General
Attorney for Defendants
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3394

To: Michael Davidson, Esq. John Lord O'Brien Hall State University of New York Buffalo, New York 14260 Defendants' Motion to Dismiss the Complaints or for Summary Judgment

STROOCK & STROOCK & LAVAN 61 Broadway New York, New York 10006

McNames, Lochner, Titus & Williams, P.C. 75 State Street Albany, New York 12201

KEVIN KENNEDY, Esq. 1520 Genesse Building Buffalo, New York 14202 Affidavit of J. Wilmer Mirandon in Support of Defendants' Motion for Summary Judgment and in Opposition to Rabinovitch Motion for Summary Judgment

> UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

> > 74 Civ. 1142 (OGJ)

ALAN RABINOVITCH,

Plaintiff.

-against-

EWALD B. NYQUIST, et al.,

Defendants.

STATE OF NEW YORK | SS.

- J. WILMER MIRANDON, being duly sworn, deposes and says:
- 1. I reside in the Town of Colonie, New York, and am presently serving as President of New York State Higher Education Services Corporation. Until July 1, 1975, I served as President of New York Higher Education Assistance Corporation.
- 2. In my capacity as President of New York Higher Education Assistance Corporation I was entirely familiar with the regulations of the Corporation and the eligibility requirements promulgated by said Corporation for the approval of guaranteed student loans.

# Mirandon Affidavit

- 3. Said Corporation has always required that an alien applicant have permanent resident status and indicate his desire to become a citizen of the United States.
- 4. These regulations of New York Higher Education Assistance Corporation were filed with the United States Office of Education, Division of Insured Loans, and deponent knows that the administrators of the Federal Program were aware of the eligibility requirements adopted by said Corporation.
- 5. At no time has anyone employed in the United States Office of Education expressed any disapproval of said eligibility requirements or any concern that these requirements seemed more restrictive than the Federal requirements, which provide, in substance, that an alien loan applicant need only establish permanent resident status.
- 6. Deponent is informed and believes that there are within the City of New York three banks which make student loans to non-citizens, which said loans are guaranteed directly by the United States Office of Education, and that applicants for those loans need only establish permanent resident status. These banks are First National City Bank, Emigrant Savings Bank and Bankers Trust Company. In other words, a non-citizen who does not wish to indicate his desire to become a citizen may apply for a loan at one of those banks, which in turn will secure a guaranty directly from the Federal Government.

(Sworn to by J. Wilmer Mirandon, on July 15, 1975.)

Statement Pursuant to Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York in Opposition to Rabinovitch Rule 9-g

# [SAME TITLE]

- 1. Defendants contend that there are triable issues of fact as follows:
- (a) As to plaintiff's intentions as set forth in paragraphs 4 and 5 of his Rule 9(g) statement
- (b) As to his qualifications and eligibility for students loans, id., paragraph 6
- Defendants contend that there are no triable issues as to the fact that plaintiff failed to apply to defendant New York Higher Education Assistance Corporation for participation in the guaranteed student loan program.
- 3. Defendants contend that paragraphs 11 and 12 of plaintiff's Rule 9(g) statement contain inaccurate statements of the law with respect to the payment of financial aid to aliens, who, pursuant to Education Law § 661(3) are eligible for such financial aid if they have applied for United States citizenship or submit a statement affirming intent to apply for United States citizenship as soon as they have the qualifications, and must apply as soon as eligible for citizenship.

# Defendants' Rule 9(g) Statement

4. In all other respects, defendants concur in the statement of facts set forth in plaintiff's Rule 9(g) statement.

Dated: New York, New York July 16, 1975

Yours, etc.,

Louis J. Lefkowitz
Attorney General of the
State of New York
By: s/ Robert S. Hammer
Robert S. Hammer
Assistant Attorney General
Attorney for Defendants
Office and P. O. Address
Two World Trade Center
New York, New York 10047

# Student Payment Application, General Information and Instructions for 1974-75 Academic Year (Excerpts), Exhibit "A" in Mauclet v. Nyquist

The University of the State of New York

#### THE STATE EDUCATION DEPARTMENT

REGENTS EXAMINATION AND SCHOLARSHIP CENTER
99 Washington Avenue
Albany, New York 12210

#### To the Applicant:

This booklet contains your Student Payment Application for receiving benefits during the 1974-75 academic year under the Regents scholarship, child-of-veteran, and scholar incentive programs. In addition, it provides important general information for all applicants and specific instructions for completing the application form. Be sure to read carefully those sections of the booklet that apply to you.

Note: You must file your Student Payment Application by May 15, 1975, to be eligible to receive benefits for the 1974-75 academic year.

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#### [2] Section 1

#### GENERAL INFORMATION FOR ALL STUDENTS

This section describes requirements and benefits under the major programs of student financial assistance awards provided by the State of New York:

- (a) Scholar incentive awards
- (b) Regents awards for children of deceased or disabled veterans
- (c) Regents scholarships

#### Student Payment Application, 1974-75 Academic Year, Exhibit "A," Mauclet v. Nyquist

In addition, it explains the award certificate issued to students and the procedure for making payment. (See para-

graphs d and e.)

Read carefully the information concerning each type of award. If you meet the eligibility requirements, complete the enclosed Student Payment Application according to the directions in section 2. Keep this booklet for future reference. It will help you to verify the accuracy of the award certificate that will be issued upon approval of your application.

In addition to a New York State award, you may be eligible to receive assistance under a federal program of aid to college students. For your convenience, a brief explanation of the Federal programs is presented in paragraph f, below.

#### a. Scholar Incentive Awards

Eligibility. You are eligible to receive a scholar incentive award if you:

- (1) Are now a legal resident of New York State and have been a legal resident for at least 1 year. (If you have been residing in New York State for less than a full year, you may also qualify if you were previously a resident during your final year of high school or college study.)
- (2) Are a citizen of the United States, or have made application for such citizenship, or file a statement of intent to make such application.
- (3) Are matriculated in an approved program in New York State. Approved programs include college programs leading to an approved degree or certificate, hospital school programs of professional nursing, 2-year programs in registered private business schools, and degree programs in

trade or technical schools. (Students enrolled in the following types of programs are not eligible: nondegree programs in trade or technical schools, 1-year programs in registered private business schools, programs in hospital schools that do not lead to the professional nurse license, postdoctoral programs, or programs of theological or spiritual training.)

- (4) Are a full-time student, enrolled for a minimum of 12 credits a semester, or 8 credits a quarter, or the equivalent. (Regular full-time students who have been restricted to limited physical regimen by serious medical disabilities may request special consideration, but prior approval for a limited program of study must be obtained.)
- (5) Have a tuition charge (exclusive of fees) in excess of \$200 a year.
- (6) Had a combined family net taxable income for 1973 not exceeding \$20,000. (For an explanation of how net taxable income is determined, see section 3, par. b.)
- (7) File the Student Payment Application by the required deadline date, May 15, 1975.

You may receive scholar incentive assistance for a maximum of 4 years of undergraduate study (or 5 years in an approved 5-year baccalaureate program) and for a maximum of 4 years of graduate or professional study, but not for a total of more than 8 years of combined professional, graduate, and undergraduate study. Each year that you receive Regents scholarship or child-of-veteran assistance, even if additional scholar incentive assistance is not received, is counted as also reducing the remaining years of scholar incentive eligibility.

Award Schedule: The schedule of maximum scholar incentive awards established by law for the 1974-75 academic year is as follows:

#### Student Payment Application, 1974-75 Academic Year, Exhibit "A," Mauclet v. Nyquist

New York State Net Taxable Balance	Maximum Award For Year
\$2000 or less	\$600
2001-6000	
6001-8000	
8001-20,000	
20,001 or more	

Adjustments in Awards. It is important to keep in mind that this schedule indicates only the upper limit of your award, as determined by income. Many students will receive less than the maximum entitlement indicated in this schedule, because of two types of adjustments required by law:

- (1) Adjustment for tuition charge. Scholar incentive awards are for tuition only and they do not cover the first \$200 of tuition per year. For example, if your tuition charge is \$650 for the next year, your scholar incentive payment cannot be more than \$450. If the tuition charge does not exceed \$200 a year, no scholar incentive payment will be made. The costs of fees, books, dormitory, meals, and other expenses are not considered as tuition and cannot be covered by scholar incentive assistance.
- (2) Adjustment for State, Federal, and other awards. Scholar incentive awards are limited by other educational benefits that would duplicate the purposes for which scholar incentive assistance is intended (except GI benefits, U.S. War Orphan benefits, or educational opportunity grants). If you are already receiving duplicative State, Federal or other benefits equal to the tuition charge, no scholar incentive assistance can be paid. If such other benefits are less than your tuition charge, the balance of your tuition may be covered by a scholar incentive award up to the maximum entitlement established above. (For an explana-

tion of what other educational benefits would duplicate the purposes of scholar incentive assistance, see instructions for Item 13, section 2.)

[3] b. Regents Awards for Children of Deceased or Disabled Veterans

Eligibility. You are eligible to receive this award if you:

- (1) Are the child of a person: (a) who died in military service during World War I, World War II, the Korean Conflict, or the Vietnam Conflict, as a result of regular active duty during such a period, and who was a resident of New York State at time of induction or time of death, or (b) who is an honorably discharged veteran with a current disability of at least 50 percent resulting from service during such period, or who had such disability at time of death, and was a resident of New York State at time of induction.
  - (2) Are a legal resident of New York State.
- (3) Are matriculated in an approved undergraduate program leading to a degree, dipoloma, or certificate in a college, or in a professional nursing program in a hospital school, or in a degree program in a business, trade, or technical school in New York State. (Students enrolled in nondegree programs in business, trade, or technical schools, or in nonnursing programs in hospital schools, or in programs of theological or spiritual training, are not eligible.)
- (4) Are a full-time student, enrolled for a minimum of 12 credits a semester, or 8 credits a quarter, or the equivalent.
- (5) File a special application for the award by the required date, as established below.

#### Student Payment Application, 1974-75 Academic Year, Exhibit "A," Mauclet v. Nyquist

Benefits. All eligible students receive a uniform award of \$450 a year for a maximum of 4 years of undergraduate study, or 5 years if the normal program of study is 5 years. The award is independent of family income or college tuition charge.

# c. Regents Scholarships

The following scholarships are awarded by the Regents:

- (1) Regents college scholarships,
- (2) Regents scholarships for basic professional education in nursing,
- (3) Regents war service scholarships for veterans,
- (4) Regents scholarships for professional education in medicine, dentistry, and osteopathy.

These scholarships are awarded on a competitive basis to students who have made special application for such awards and who have taken the required competitive examinations. The Student Payment Application in itself does not constitute a formal application for a Regents scholarship.

#### [5] Section 2

INSTRUCTIONS FOR COMPLETING 1974-75
STUDENT PAYMENT APPLICATION

Eligibility for payment is not continued automatically from one academic year to the next. Each spring, a new application [6] form will be mailed to the legal address of

every student whose application was accepted during the previous college year, and also to every student who wrote the Regents Scholarship and College Qualification Test the previous fall. Other students may request applications after June 1. To assure receiving your application promptly, always report immediately any change in your legal address.

Item 8. ["Are you a citizen of the United States? Yes No [ (If No, Follow Instructions)"]. Citizenship: If entry is "No," you must obtain and submit a "Certificate of Intent to Apply for Citizenship" (SFA-414). To request this form use page 17. Also, see sec- [7] tion 3, par. d for an explanation of the residence status of noncitizens.

Item 11. ["Will you have been a legal resident of New York State for the 12 months immediately preceding the beginning of the first term for which you are requesting Financial Assistance? Yes \( \subseteq \text{No } \subseteq.\)?"] Residence: An explanation of the legal residence requirement is given in section 3, par. d.

If you are not now a legal resident, or, if you have not been a legal resident of New York State for the 12 months immediately preceding the beginning of the first term for which you are requesting assistance, check "No."

If you have checked "No," see section 3, par. d for special instructions.

#### [10] SECTION 3

#### SPECIAL INSTRUCTIONS

(This section contains instructions and information of special interest to certain groups of students. The preced-

#### Student Payment Application, 1974-75 Academic Year, Exhibit "A," Mauclet v. Nyquist

ing sections will refer you to specific parts of section 3 that may apply to you.)

#### a. Awards for Regents Scholarships.

#### Regents College Scholarships

Net Taxable	Annual
Balance	Award
\$1,800 or less	\$1,000
Between 1,800 and 9,300	999-251
9,300 or more	250

#### [12] d. Residence.

To qualify for a scholar incentive award, you must have been a legal resident of New York State for at least 12 months immediately preceding the beginning of the term for which you are applying for assistance and you must continue to maintain such residence during the period of the award. An applicant for an undergraduate award who is now a resident, but has not been a resident for the past year, may qualify if he was a resident during his last two terms of high school. Similarly, an applicant for a graduate level award who is now a resident, but has not been a resident for the past year, may qualify if he was a resident during his last two terms of undergraduate level study and continued such residence until matriculation in a graduate program.

It should be noted that permanent, bona fide residence in New York State is required. Residence at a school or college for purpose of study does not in itself change the student's legal residence. The legal residence of an unmarried college student is presumed to be the residence of the par-

ents. If the parents are not legal residents of New York State, the student will be considered a resident of New York State only if such claim is supported by specific confirmatory action, such as registering to vote in New York State. However, married students who have established a separate residence can generally claim such residence as their legal residence, unless there has been specific action indicating intent to establish or maintain residence elsewhere.

You are not a legal resident of New York State unless you are either a citizen of the United States or an immigrant to the United States. Foreign visitors holding student or other non-permanent visas are not legal residents.

Regents scholarship recipients who establish their legal residence at the time of their award must continue to maintain such residence during the period of the award.

The residence of a person is often a difficult question of law, depending on individual circumstances. If you have any question about your eligibility with regards to the residence requirement, complete the residence certificate and your case will be referred to our legal advisors for an opinion.

#### [17] REQUEST FOR SUPPLEMENTARY FORMS

Print your name and mailing address in this box.

Name

Number and Street

City-State ZIP Code

# Student Payment Application, 1974-75 Academic Year, Exhibit "A," Mauclet v. Nyquist

DATE

IDENT. No.

SERIES PROGRAM NUMBER

DATE OF BIRTH

Month / Day / Year

You may use this form to request supplementary forms that you may need to complete your application. Supplementary forms should be submitted with completed application to insure expeditious processing of the application. Read the instructions carefully. Then, if necessary, detach and complete this form. Print your name and mailing address in the box provided above, check below the forms requested, and mail this form to:

Regents Examination and Scholarship Center The State Education Department 99 Washington Avenue Albany, New York 12210

(Do not use the envelope enclosed in the booklet for mailing this form. The envelope provided is for mailing your application.)

□ SFA 14C	Request for Exclusion of Parental Income
☐ SFA 14D	Certification of Residence in New York State
□ SFA 100	New York State Scholarship and Grant Programs Indicate the scholarship program for which you wish to make applica- tion.
☐ SFA 166A	Information and Application for Children of Deceased or Disabled Veterans
☐ SFA 414	Certificate of Intent to Apply for Citizenship

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,

Plaintiff

-vs-

EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendant

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

74-C-1142

ALAN RABINOVITCH, on behalf of himself and on behalf of all others similarly situated; namely, all residents of New York State who have been or may be denied New

**Plaintiffs** 

-against-

York State Regents Scholarships, etc.,

EWALD B. NYQUIST, Commissioner of Education of the State of New York, The University of the State of New York, et al.,

Defendants

Before Van Graafelland, Circuit Judge, Judd, District Judge for the Eastern District of New York, and Curtin, Chief Judge, Western District of New York.

# Opinion of the Three-Judge District Court

CURTIN, Chief Judge:

Mauclet v. Nyquist was instituted by a resident alien in the Western District of New York; Rabinovitch v. Nyquist was brought by a resident alien in the Eastern District of New York. In both cases, New York Education Law § 661(3) (McKinney's Supp. 1975), which requires an applicant for New York State financial aid to be a United States citizen or intend to become a citizen, was challenged as unconstitutional. The cases were consolidated and heard by a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284. The facts as set out below are not in dispute.

Plaintiff Jean-Marie Mauclet, a resident of New York State since April 1969, is a graduate student at the State University of New York at Buffalo. He is a French citizen, married to an American citizen and father of an American citizen. He submitted an application for a tuition assistance award for the academic year 1974-1975 and satisfies all requirements for the award except citizenship.

<sup>1 § 661(3),</sup> former § 602(2), provides, in pertinent part, as follows:

Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship.

(McKinney's Supp. 1975.)

<sup>&</sup>lt;sup>2</sup> There are three general forms of student financial assistance: (1) General Awards, which include tuition assistance; (2) Academic Performance Awards, including regents scholarships; and (3) Student loans and loan guarantees. N.Y. Educ. Law §§ 667-680 (McKinney's Supp. 1975).

<sup>&</sup>lt;sup>3</sup> Both plaintiffs motioned to amend their complaints to include the New York State Higher Education Services Corporation, an educational corporation formed in 1975, which coordinates the New York State financial aid programs. N.Y. Educ. Law § 652 (McKinney's Supp. 1975). The motions were granted orally at the three-judge court.

Plaintiff Alan Rabinovitch, a Canadian citizen, has been a resident of New York State since 1964. In January 1973, Mr. Rabinovitch took the competitive Regents Qualifying Examination, and thereafter was informed by defendants University of the State of New York and the Board of Regents that he was qualified to receive a regents scholarship. Subsequently, Mr. Rabinovitch was informed that the offer of scholarship was withdrawn solely because he did not intend to become a citizen, as required by § 661(3).

Both plaintiffs seek a judgment declaring § 661(3) invalid, enjoining its enforcement and requiring defendants to process the plaintiffs' applications for assistance. In addition, plaintiff Rabinovitch requests damages for past monies withheld by defendants. Both plaintiffs ask for attorney fees and costs.

Plaintiffs contend that § 661(3) denies to resident aliens the equal protection of the laws guaranteed by the fourteenth amendment, and conflicts with the comprehensive and preemptive congressional scheme regulating the entry and residence of aliens in the United States.

We must first resolve the preliminary question of standing. Clearly, plaintiffs have standing to contest the statute as it applies to the scholarship and tuition assistance award programs. However, defendants claim that plaintiffs do not have standing to challenge § 661(3) with respect to the student loan aspect of the program. Rabinovitch never applied for a student loan and Mauclet received one in the past, before he announced his intention not to become a United States citizen. At oral argument, the State admitted that had Rabinovitch applied for a student loan, and refused to make the required statement of intention to become a United States citizen, his application would have been refused. But the State apparently feels that the actual denial of an application is necessary to give plaintiffs standing to contest the constitutionality of § 661(3) as regards student loans. We do not agree.

# Opinion of the Three-Judge District Court

Nothing would be gained by adjudicating the statute as it applies to all but one aspect of the assistance program. Both plaintiffs allege injuries from this statute. Both would be further injured were they to apply for student loans. We feel that this is a proper case in which to apply the expanded concept of standing and allow these plaintiffs to assert the rights of those aliens who are injured by this statute with regard to loans. Eisenstadt v. Baird, 405 U.S. 438, 443-446 (1972); Barrows v. Jackson, 346 U.S. 249 (1953).

In Graham v. Richardson, 403 U.S. 365 (1971), the Supreme Court declared:

[C] lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority... for whom such heightened judicial solicitude is appropriate. 403 U.S. at 372. (Footnotes and citations omitted, emphasis added.)

The defendants maintain that the classification involved here is not based on alienage per se because only those aliens who do not wish to become citizens are denied assistance. The defendants emphasize that the applications of many resident aliens have been granted after these individuals either applied for United States citizenship or signed a statement agreeing to do so as soon as they were eligible. This argument defies logic. Those aliens who apply, or agree to apply when eligible, for citizenship are relinquishing their alien status. Because some aliens agree under the statute's coercion to change their status does not alter the fact that the classification is based solely on alienage.

Next the defendants argue that since education is not a fundamental or basic constitutional right, San Antonio

Independent School District v. Rodriguez, 411 U.S. 1 (1973), the standard of strict judicial scrutiny is inapplicable. But it is long settled that where a suspect classification is involved, strict scrutiny is to be invoked whether or not the right involved is fundamental. Graham v. Richardson, supra, at 375-376.

In the case In Re Griffiths, 413 U.S. 717 (1973), in which a Connecticut rule excluding aliens from admission to the practice of law was struck down, the Supreme Court was explicit as to the burden a state must bear to justify the use of a suspect classification:

The Court has consistently emphasized that a State which adopts a suspect classification "bears a heavy burden of justification," *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964), a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary... to the accomplishment" of its purpose or the safeguarding of its interest. 413 U.S. at 721-722 (footnotes omitted).

Defendants have failed to meet this burden. First they argue that the various forms of assistance are gratuities that can be distributed according to the sovereign's will. But the Supreme Court "has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a privilege.' " Graham v. Richardson, supra, at 374. Next the State asserts that its interest in an educated electorate, fully able to participate in community political life, and the plaintiffs' refusal to accept the responsibilities of citizenship, are sufficient reasons for it to limit assistance to citizens and future citizens.

#### Opinion of the Three-Judge District Court

For this proposition, the State cites Spatt v. New York, 361 F.Supp. 1048, aff'd 414 U.S. 1058 (1973), in which the State's requirement that its assistance could only be used at colleges and universities within New York State was upheld. It is doubtful that defendants' explanation would survive even the rational relationship test applied in Spatt.' Although resident aliens may not vote, they pay taxes, register with the Selective Service, and "contribute in myriad other ways to our society." In Re Griffiths, supra, at 722. In any case, the State has not demonstrated a compelling interest justifying its discriminatory classification.

§ 661(3) is therefore unconstitutional and defendants are enjoined from its enforcement. Defendants are directed to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed.

Having ruled on plaintiffs' fourteenth amendment claim, there is no need to reach plaintiffs' argument that § 661(3) is unconstitutional because it encroaches on the exclusive federal power over aliens.

Plaintiff Rabinovitch requests money damages in addition to injunctive relief. While declaratory and injunctive relief is appropriate, it is the opinion of this court that *Edelman* v. *Jordan*, 415 U.S. 651 (1974), holding that the eleventh amendment barred the courts from ordering state

<sup>&</sup>lt;sup>4</sup> The court in *Spatt* found no fundamental right or suspect classification invoking strict scrutiny, and therefore analyzed the State's interests under the rational relationship test. The court found that the State had a valid interest in encouraging gifted students to attend New York schools, in building a strong system of colleges within the State and in attempting to achieve an equalization of school financing costs between in-state and out-of-state students. None of the above mentioned interests are served by excluding qualified, tax-paying resident aliens.

officials to remit benefits wrongfully withheld from eligible welfare applicants, does not allow the award of money damages in this case.

So ordered.

s/ Ellsworth A. Van Graafeiland Ellsworth A. Van Graafeiland United States Circuit Judge

s/ Orrin G. Judd
Orrin G. Judd
United States District Judge
Eastern District of New York

s/ John T. Curtin
John T. Curtin
United States District Judge
Western District of New York

Dated: February 11, 1976.

# Judgment in Mauclet v. Nyquist

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE No. 75-73

JUDGMENT

JEAN-MARIE MAUCLET

vs.

EDWALD B. NYQUIST, Commissioner of Education of the State of New York

This action came on for trial (hearing) before the Court, Honorable Ellsworth A. VanGraafeiland, Orrin G. Judd and John T. Curtin, United States District Judge[s], presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Section 661(3) of the New York Education Law is unconstitutional and defendants are enjoined from its enforcement. Defendants are directed to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit.

Dated at Buffalo, New York, this 11th day of February, 1976.

John K. Adams Clerk of Court

# Notice of Appeal in Mauclet v. Nyquist

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

Civ-75-73

NOTICE OF APPEAL

JEAN-MARIE MAUCLET,

Plaintiff,

against

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and New York Higher Education Services Corporation,

Defendants.

Notice is hereby given, that the above-named defendants hereby appeal to the Supreme Court of the United States from the final order and judgment of this Court entered February 11, 1976, which, inter alia, declared New York Education Law § 661(3) unconstitutional and enjoined its enforcement.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Louis J. Lefrowitz
Attorney General of
the State of New York
Attorney for Defendants

By s/ROBERT S. HAMMER
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Notice of Appeal in Mauclet v. Nyquist

To: Kevin Kennedy, Esq. 1520 Genesee Building Buffalo, New York 14202

and

MICHAEL DAVIDSON, Esq. John Lord O'Brian Hall State University of New York Buffalo, New York 14260 Attorneys for Plaintiff

McNamee, Lochner, Titus & Williams, P.C. Co-Attorneys for Defendant NYHEAC 75 State Street Albany, New York 12201

[Filed in W.D.N.Y. on March 12, 1976.]

# Judgment in Mauclet v. Nyquist and Rabinovitch v. Nyquist

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,

Plaintiff.

-vs.-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and New York STATE HIGHER EDUCATION SERVICES CORPORATION,

Defendants.

United States District Court Eastern District of New York

74 Civ 1142

ALAN RABINOVITCH,

Plaintiff.

-vs.-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, The University of the State of New York, The Board of Regents of the State of New York, The New York State Higher Education Services Corporation and the Nine Individual Members of the Board of Trustees of Said Corporation, namely Does 1 through VI and ex officio Ewald B. Nyquist, Ernest L. Boyle and Robert J. Kibee, and the President of Said Corporation (the unnamed individuals being unknown to plaintiff),

Defendants.

#### Judgment in Mauclet v. Nyquist and Rabinovitch v. Nyquist

This action came on for trial before a three judge court, the Honorable Ellsworth A. Van Graafeiland, United States Circuit Judge, the Honorable Orrin G. Judd, United States District Judge, and the Honorable John T. Curtin, United States District Judge, presiding, and a memorandum and order of the court having been filed on February 17, 1976, that New York Education Law § 661(3) is unconstitutional and that defendants are enjoined from its enforcement and directing the defendants to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed, and denying money damages to plaintiff Rabinovitch.

Ordered and adjudged that New York Education Law § 661(3) is unconstitutional and the defendants are enjoined from its enforcement, and that the defendants process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and re-qualify plaintiff Rabinovitch as a State regents scholar-ship recipient, as of the date his complaint was filed and that the plaintiff Rabinovitch is not entitled to money damages.

Dated: Brooklyn, New York March 26, 1976

> Lewis Orgel Clerk

ELLSWORTH VAN GRAAFEILAND U.S.C.J.

> JOHN T. CURTIN U.S.D.J.

ORRIN G. JUDD U.S.D.J.

[Filed in E.D.N.Y. on March 29, 1976.]

# Notice of Appeal in Mauclet v. Nyquist and Rabinovitch v. Nyquist

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

Civ. 75-73 (JTC)

JEAN-MARIE MAUCLET,

Plaintiff,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and New York Higher Education Services Corporation,

Defendants.

#### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

NOTICE OF APPEAL 74 C 1142 (OGJ)

ALAN RABINOVITCH,

Plaintiff,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Defendants.

Notice is hereby given, that the defendants herein hereby appeal to the Supreme Court of the United States from so much of the amended final order and judgment of this Court entered March 29, 1976, which, inter alia, declared New York Education Law § 661(3) unconstitutional,

#### Notice of Appeal in Mauclet v. Nyquist and Rabinovitch v. Nyquist

enjoined its enforcement, directed the requalification of the plaintiff Rabinovitch as a State Regents scholarship recipient and the processing of plaintiff Mauclet's application for tuition assistance.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Louis J. Lefkowitz Attorney General of New York State

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[Filed in E.D.N.Y. on May 28, 1976.]